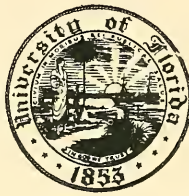


SELECT READINGS IN AMERICAN GOVERNMENT




W. B. STUBBS AND C. B. GOSNELL

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Select Readings
IN
American Government

EDITED BY
WILLIAM B. STUBBS
AND
CULLEN B. GOSNELL

PROFESSORS OF POLITICAL SCIENCE
EMORY UNIVERSITY
GEORGIA



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PREFACE



This book, *Select Readings in American Government*, is published for the purpose of providing in a convenient form a number of carefully chosen articles, excerpts, and documents the reading of which will aid the student or the lay citizen of the United States in developing an intelligent understanding of the federal system of government in which he participates and for which he carries such heavy responsibilities. It is designed especially for use in college classes as supplementary material in a general course in American government. Obviously, it is not planned for specialists.

Federal government is necessarily legal in nature. Some knowledge of constitutions is essential even for the average citizen. Readings in this book furnish some information about constitutions, but not enough for the constitutional lawyer. Constitutions in America today have grown out of past experience and have been influenced by political thinkers of the past. Some selections are included to help the reader realize this significant fact; but historians will need to go deeper, and political theorists will want to read far beyond the limits of this volume. Decisions of the Supreme Court of the United States can not be omitted if one is to understand American government, but this not a case-book. Few people will want to read all of the *Congressional Record*, but valuable aid for the understanding of government may be gained from excerpts from that *Record*.

An understanding of the functioning of government depends not only upon some appreciation of constitutions, history, past political thought, Supreme Court decisions, and official actions of men in governmental positions, but also upon an acquaintance with personalities and pressures which are dominant in government at any given time. The editors have, therefore, deemed it advisable to include some articles which encourage thought about personalities and pressures.

Obviously a book of this kind is the product of many minds and is made possible by the work of previous publishers. The editors want to express their appreciation, first, to those writers and publishers of past generations and of other countries whose work has come down to us and

from whom it was physically impossible to ask permission for use of their contributions. Second, sincere thanks and grateful acknowledgment are due to the many writers and publishers who have so liberally given permission for the use of their work. Too numerous to be listed here, the reader is asked to give heed to their several names in the introductory notes made by the editors, including the footnotes.

To many at Emory University the editors acknowledge indebtedness and express their appreciation,—especially to Miss Margaret Jemison, Librarian, and to members of the staff in both the Main Library and the Law Library; to Dean J. H. Purks, Jr., of the College of Arts and Sciences; to Dr. O. R. Quayle, Chairman, and the other members of the Research Committee; to Dean Charles J. Hilkey and Miss Frances Kaiser, Secretary, of the Lamar School of Law; to Dr. L. M. Holland, Dr. J. F. Allums, and Marion J. Rice, of the Department of Political Science; to Mrs. W. B. Stubbs and Mrs. J. B. Tigner, who gave many hours of their time assisting in the preparation of the manuscript. Dr. J. Harvey Young, of the Department of History, and other colleagues at Emory made helpful suggestions.

Dr. E. Allen Helms, of Ohio State University, editor of the series in which this volume is published, contributed valuable suggestions which improved the work of the editors. Others in the field of political science have made helpful comments,—including Dr. Walter Bennett of the University of Alabama, Dr. Francis W. Coker of Yale, Dr. Edward S. Corwin of Princeton, Dr. Merritt B. Pound of the University of Georgia, Dr. H. M. Alexander of the University of Arkansas, Dr. J. B. Stalvey of the University of Miami, and Dr. Francis Wilson of the University of Illinois.

The value of a book of this type depends primarily upon the material selected for inclusion by the editors. As these readings have been prepared to supplement, not to displace a textbook, explanatory notes have been reduced to a minimum. It is hoped that readers will be aided in the development of intelligent, critical, responsible citizenship.

W. B. S.

C. B. G.

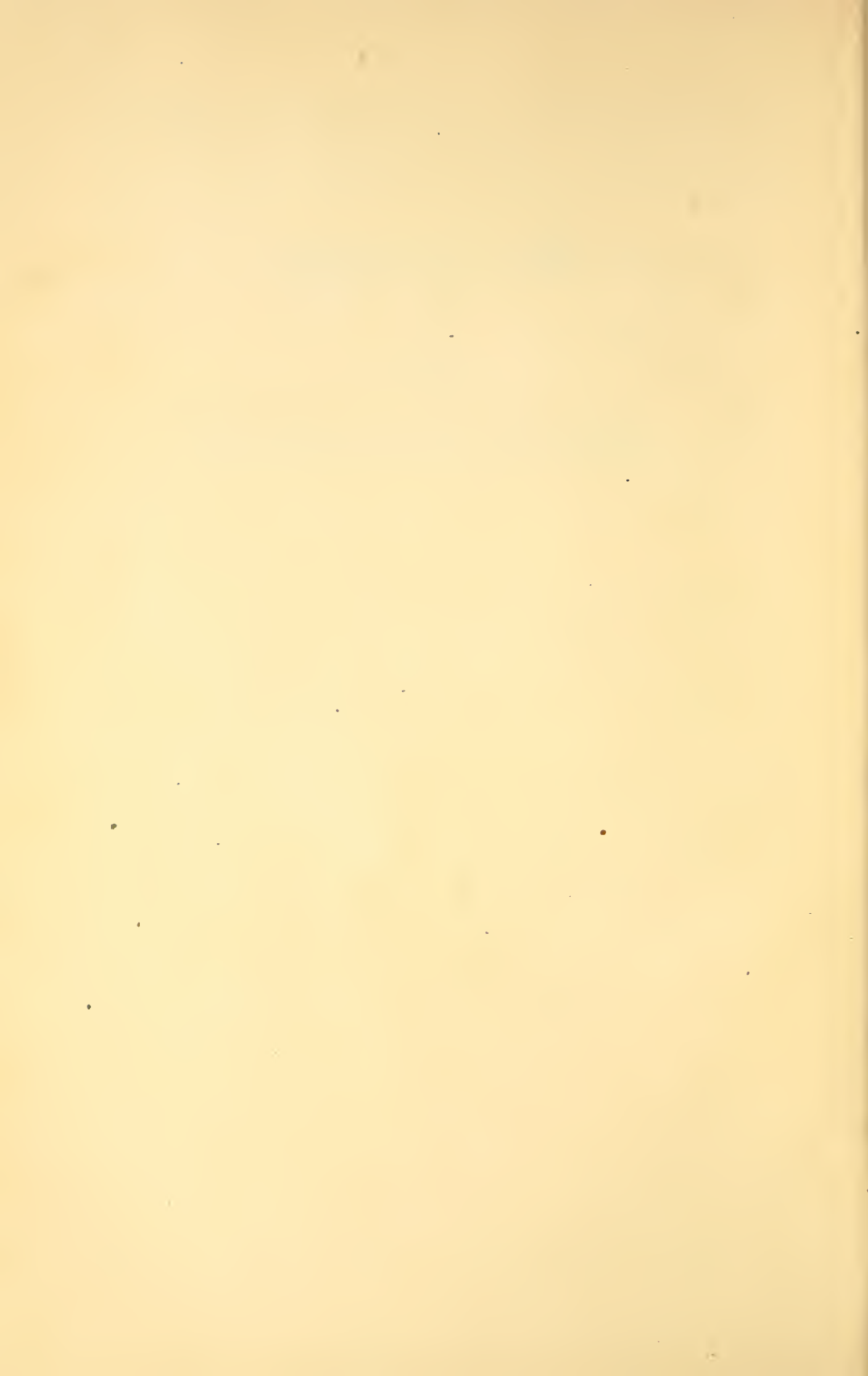
Emory University, Georgia

April 24, 1948

I
The Constitution



1. CONSTITUTION OF THE UNITED STATES
2. AMENDMENTS TO THE CONSTITUTION



I

THE CONSTITUTION



Constitution of the United States

1. CONSTITUTION OF THE UNITED STATES¹

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative;

¹From *The Constitution of the United States of America (Annotated)*, Senate Document No. 232, 74th Congress, 2nd Session (Washington: Government Printing Office, 1938).

and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the

Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of

the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the

Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that

Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take

Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,

G^o Washington—Presidt.
and deputy from Virginia

New Hampshire	{ John Langdon Nicholas Gilman
Massachusetts	{ Nathaniel Gorham Rufus King
Connecticut	{ Wm. Saml. Johnson Roger Sherman
New York . . .	Alexander Hamilton
New Jersey	{ Wil: Livingston David Brearley. Wm. Paterson. Jona: Dayton

Pennsylvania	{	B Franklin
	{	Thomas Mifflin
	{	Robt Morris
	{	Geo. Clymer
	{	Thos. FitzSimons
	{	Jared Ingersoll
	{	James Wilson
Delaware	{	Gouv Morris
	{	Geo : Read
	{	Gunning Bedford jun
	{	John Dickinson
Maryland	{	Richard Bassett
	{	Jaco : Broom
	{	James McHenry
Virginia	{	Dan of St. Thos. Jenifer
	{	Danl Carroll
	{	John Blair—
North Carolina	{	James Madison Jr.
	{	Wm. Blount
	{	Richd. Dobbs Spaight.
South Carolina	{	Hu Williamson
	{	J. Rutledge
	{	Charles Cotesworth Pinckney
	{	Charles Pinckney
Georgia	{	Pierce Butler
	{	William Few
	{	Abr Baldwin

2. ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.¹

AMENDMENT I.

[Ratification of the first ten amendments was completed
December 15, 1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

¹ From *The Constitution of the United States of America (Annotated)*, Senate Document No. 232, 74th Congress, 2nd Session (Washington: Government Printing Office, 1938).

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI.

[January 8, 1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII.

[September 25, 1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall

sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII.

[December 18, 1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.

[July 28, 1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.

[March 30, 1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI.

[February 25, 1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII.

[May 31, 1913]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII.

[January 29, 1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX.

[August 26, 1920]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX.

[February 6, 1933]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Sec. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Sec. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Sec. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Sec. 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Sec. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI.

[December 5, 1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

II

Early Documentary Background



3. MAGNA CARTA—1215
4. THE FIRST CHARTER OF VIRGINIA—1606
5. MAYFLOWER COMPACT—1620
6. THE PETITION OF RIGHT—1628
7. THE ARTICLES OF CONFEDERATION OF THE
UNITED COLONIES OF NEW ENGLAND—1643
8. BILL OF RIGHTS—1689

T

HE Constitution of the United States of America represents the climax of a gradual growth of political institutions, the beginnings of which go far back in the history of Western Civilization. Selections from the most outstanding documents representing important stages in this growth are given here to help the student to see for himself a relationship of present institutions to developments of past centuries.

2

EARLY DOCUMENTARY BACKGROUND



3. MAGNA CARTA—1215

Addressing the Constitutional Convention of the State of New York on June 15, 1915, Nicholas Murray Butler said: "In celebrating the seven hundredth anniversary of Magna Carta we celebrate one of the most notable happenings in the history of the American people. Magna Carta, the Petition of Right, the Charter of Liberties and Privileges for the inhabitants of New York and its dependencies, the Bill of Rights, the Declaration of Independence, the Constitution of the United States and the Emancipation proclamation of Abraham Lincoln are chapters in one long serial story."

Magna Carta symbolizes the rule of law over the king, the subordination of the administrator of government to a will other than the personal will of the office-holder, a fundamental principle of constitutional government. In 1215, King John had abused his office by disregarding rights of his subjects. The barons forced him to sign a document legally binding him not to repeat such wrongs.

The charter contains little that was new. As early as 1100, Henry I had issued a Charter of Liberties which was a formal acknowledgment of ancient freedoms and of limits to royal power. Magna Carta is, however, as Pollock and Maitland say in their *History of English Law*, "the nearest approach to an irrevocable 'fundamental statute' that England ever had." Over and over again it has served as a base for later development in those political institutions whose evolution began in England and was continued in the United States of America.

Valuable commentaries on Magna Carta will be found in George Burton Adams, *The Origin of the English Constitution*; W. S. Holdsworth, *A History of English Law*; Thomas Pitt Taswell-Langmead, *English Constitutional History*; and in the volume from which the following translation is taken, William Sharp McKechnie, *Magna Carta* (Glasgow: James Maclehose and Sons, 1914).¹ *Magna Carta* was, of course, written in Latin.

Preamble: John, by the grace of God, king of England, lord of Ireland, duke of Normandy and Aquitaine, and count of Anjou, to the archbishops, bishops, abbots, earls, barons, justiciars, foresters, sheriffs,

¹ Reprinted by permission.

stewards, servants, and to all his bailiffs and liege subjects, greeting. Know that, having regard to God and for the salvation of our souls, and those of all our ancestors and heirs, and unto the honour of God and the advancement of holy Church, and for the reform of our realm, [we have granted as underwritten] by advice of our venerable fathers, Stephen, archbishop of Canterbury, primate of all England and cardinal of the holy Roman Church, Henry archbishop of Dublin, William of London, Peter of Winchester, Jocelyn of Bath and Glastonbury, Hugh of Lincoln, Walter of Worcester, William of Coventry, Benedict of Rochester, bishops; of master Pandulf, subdeacon and member of the household of our lord the Pope, of brother Aymeric (master of the Knights of the Temple in England), and of the illustrious men William Marshal, earl of Pembroke, William, earl of Salisbury, William, earl Warenne, William, earl of Arundel, Alan of Galloway (constable of Scotland), Waren Fitz Gerald, Peter Fitz Herbert, Hubert de Burgh (seneschal of Poitou), Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip d'Aubigny, Robert of Roppesley, John Marshal, John Fitz Hugh, and others, our liegemen.

1. In the first place we have granted to God, and by this our present charter confirmed for us and our heirs for ever that the English church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III., before the quarrel arose between us and our barons: and this we will observe, and our will is that it be observed in good faith by our heirs for ever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the underwritten liberties, to be had and held by them and their heirs, of us and our heirs forever.

2. If any of our earls or barons, or others holding of us in chief by military service shall have died, and at the time of his death his heir shall be full of age and owe "relief" he shall have his inheritance on payment of the ancient relief, namely the heir or heirs of an earl, £100 for a whole earl's barony; the heir or heirs of a baron, £100 for a whole barony; the heir or heirs of a knight, 100s. at most for a whole knight's fee; and whoever owes less let him give less, according to the ancient custom of fiefs.

3. If, however, the heir of any one of the aforesaid has been under age and in wardship, let him have his inheritance without relief and without fine when he comes of age.

4. The guardian of the land of an heir who is thus under age, shall take from the land of the heir nothing but reasonable produce, reasonable customs, and reasonable services, and that without destruction or waste of men or goods; and if we have committed the wardship of the lands

of any such minor to the sheriff, or to any other who is responsible to us for its issues, and he has made destruction or waste of what he holds in wardship, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall be responsible for the issues to us or to him to whom we shall assign them; and if we have given or sold the wardship of any such land to anyone and he has therein made destruction or waste, he shall lose that wardship, and it shall be transferred to two lawful and discreet men of that fief, who shall be responsible to us in like manner as aforesaid.

5. The guardian, moreover, so long as he has the wardship of the land, shall keep up the houses, parks, fishponds, stanks, mills, and other things pertaining to the land, out of the issues of the same land; and he shall restore to the heir, when he has come to full age, all his land, stocked with ploughs and "waynage," according as the season of husbandry shall require, and the issues of the land can reasonably bear.

6. Heirs shall be married without disparagement, yet so that before the marriage takes place the nearest in blood to that heir shall have notice.

7. A widow, after the death of her husband, shall forthwith and without difficulty have her marriage portion and inheritance; nor shall she give anything for her dower, or for her marriage portion, or for the inheritance which her husband and she held on the day of the death of that husband; and she may remain in the house of her husband for forty days after his death, within which time her dower shall be assigned to her.

8. No widow shall be compelled to marry, so long as she prefers to live without a husband; provided always that she gives security not to marry without our consent, if she holds of us, or without the consent of the lord of whom she holds, if she holds of another.

9. Neither we nor our bailiffs shall seize any land or rent for any debt, so long as the chattels of the debtor are sufficient to repay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is able to satisfy the debt; and if the principal debtor shall fail to pay the debt, having nothing wherewith to pay it, then the sureties shall answer for the debt; and let them have the lands and rents of the debtor, if they desire them, until they are indemnified for the debt which they have paid for him, unless the principal debtor can show proof that he is discharged thereof as against the said sureties.

10. If one who has borrowed from the Jews any sum, great or small, die before that loan be repaid, the debt shall not bear interest while the heir is under age, of whomsoever he may hold; and if the debt fall into our hands, we will not take anything except the principal sum contained in the bond.

11. And if anyone die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if any children of the deceased are left under age, necessities shall be provided for them in keeping with the holding of the deceased; and out of the residue the debt

shall be paid, reserving, however, service due to feudal lords; in like manner let it be done touching debts due to others than Jews.

12. No scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be levied more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.

13. And the city of London shall have all its ancient liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.

14. And for obtaining the common counsel of the kingdom anent the assessing of an aid (except in the three cases aforesaid) or of a scutage, we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons, severally by our letters; and we will moreover cause to be summoned generally, through our sheriffs and bailiffs, all others who hold of us in chief, for a fixed date, namely, after the expiry of at least forty days, and at a fixed place; and in all letters of such summons we will specify the reason of the summons. And when the summons has thus been made, the business shall proceed on the day appointed, according to the counsel of such as are present, although not all who were summoned have come.

15. We will not for the future grant to any one licence to take an aid from his own free tenants, except to ransom his body, to make his eldest son a knight, and once to marry his eldest daughter; and on each of these occasions there shall be levied only a reasonable aid.

16. No one shall be distrained for performance of greater service for a knight's fee, or for any other free tenement, than is due therefrom.

17. Common pleas shall not follow our court, but shall be held in some fixed place.

18. Inquests of *novel disseisin*, of *mort d'ancestor*, and of *darrein presentment*, shall not be held elsewhere than in their own county-courts, and that in manner following,—We, or, if we should be out of the realm, our chief justiciar, will send two justiciars through every county four times a year, who shall, along with four knights of the county chosen by the county, hold the said assizes in the county court, on the day and in the place of meeting of that court.

19. And if any of the said assizes cannot be taken on the day of the county court, let there remain of the knights and freeholders, who were present at the county court on that day, as many as may be required for the efficient making of judgments, according as the business be more or less.

20. A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet

saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage"—if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.

21. Earls and barons shall not be amerced except through their peers, and only in accordance with the degree of the offence.

22. A clerk shall not be amerced in respect of his lay holding except after the manner of the others aforesaid; further, he shall not be amerced in accordance with the extent of his ecclesiastical benefice.

23. No village or individual shall be compelled to make bridges at river banks, except those who from of old were legally bound to do so.

24. No sheriff, constable, coroners, or others of our bailiffs, shall hold pleas of our Crown.

25. All counties, hundreds, wapentakes, and trithings (except our demesne manors) shall remain at the old rents, and without any additional payment.

26. If any one holding of us a lay fief shall die, and our sheriff or bailiff shall exhibit our letters patent of summons for a debt which the deceased owed to us, it shall be lawful for our sheriff or bailiff to attach and catalogue chattels of the deceased, found upon the lay fief, to the value of that debt, at the sight of law-worthy men, provided always that nothing whatever be thence removed until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased; and if there be nothing due from him to us, all the chattels shall go to the deceased, saving to his wife and children their reasonable shares.

27. If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest kinsfolk and friends, under supervision of the church, saving to every one the debts which the deceased owed to him.

28. No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

29. No constable shall compel any knight to give money in lieu of castle-guard, when he is willing to perform it in his own person, or (if he himself cannot do it from any reasonable cause) then by another responsible man. Further, if we have led or sent him upon military service, he shall be relieved from guard in proportion to the time during which he has been on service because of us.

30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

32. We will not retain beyond one year and one day, the lands of those who have been convicted of felony, and the lands shall thereafter be handed over to the lords of the fiefs.

33. All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea shore.

34. The writ which is called *praecipe* shall not for the future be issued to anyone, regarding any tenement whereby a freeman may lose his court.

35. Let there be one measure of wine throughout our whole realm; and one measure of ale; and one measure of corn, to wit, "the London quarter"; and one width of cloth (whether dyed, or russet, or "halberget"), to wit, two ells within the selvedges; of weights also let it be as of measures.

36. Nothing in future shall be given or taken for a writ of inquisition of life or limbs, but freely it shall be granted, and never denied.

37. If anyone holds of us by fee-farm, by socage, or by burgage, and holds also land of another lord by knight's service, we will not (by reason of that fee-farm, socage, or burgage,) have the wardship of the heir, or of such land of his as is of the fief of that other; nor shall we have wardship of that fee-farm, socage, or burgage, unless such fee-farm owes knight's service. We will not by reason of any small serjeanty which anyone may hold of us by the service of rendering to us knives, arrows, or the like, have wardship of his heir or of the land which he holds of another lord by knight's service.

38. No bailiff for the future shall, upon his own unsupported complaint, put anyone to his "law," without credible witnesses brought for this purpose.

39. No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.

40. To no one will we sell, to no one will we refuse or delay, right or justice.

41. All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land.

42. It shall be lawful in future for any one (excepting always those imprisoned or outlawed in accordance with the law of the kingdom, and

natives of any country at war with us, and merchants, who shall be treated as is above provided) to leave our kingdom and to return, safe and secure by land and water, except for a short period in time of war, on grounds of public policy—reserving always the allegiance due to us.

43. If anyone holding of some escheat (such as the honour of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which are in our hands and are baronies) shall die, his heir shall give no other relief, and perform no other service to us than he would have done to the baron, if that barony had been in the baron's hand; and we shall hold it in the same manner in which the baron held it.

44. Men who dwell without the forest need not henceforth come before our justiciars of the forest upon a general summons, except those who are impleaded, or who have become sureties for any person or persons attached for forest offences.

45. We will appoint as justices, constables, sheriffs, or bailiffs only such as know the law of the realm and mean to observe it well.

46. All barons who have founded abbeys, concerning which they hold charters from the kings of England, or of which they have long-continued possession, shall have the wardship of them, when vacant, as they ought to have.

47. All forests that have been made such in our time shall forthwith be disafforested; and a similar course shall be followed with regard to river-banks that have been placed "in defence" by us in our time.

48. All evil customs connected with forests and warrens, foresters and warreners, sheriffs and their officers, river-banks and their wardens, shall immediately be inquired into in each county by twelve sworn knights of the same county chosen by the honest men of the same county, and shall, within forty days of the said inquest, be utterly abolished, so as never to be restored, provided always that we previously have intimation thereof, or our justiciar, if we should not be in England.

49. We will immediately restore all hostages and charters delivered to us by Englishmen, as sureties of the peace or of faithful service.

50. We will entirely remove from their bailiwicks, the relations of Gerard of Athée (so that in future they shall have no bailiwick in England); namely, Engelard of Cigogné, Peter, Guy, and Andrew of Chauceaux, Guy of Cigogné, Geoffrey of Martigny with his brothers, Philip Mark with his brothers and his nephew Geoffrey, and the whole brood of the same.

51. As soon as peace is restored, we will banish from the kingdom all foreign-born knights, cross-bowmen, serjeants, and mercenary soldiers, who have come with horses and arms to the kingdom's hurt.

52. If any one has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five-and-twenty barons of whom mention is made below in the clause for securing the peace. Moreover,

for all those possessions, from which any one has, without the lawful judgment of his peers, been disseised or removed, by our father, King Henry, or by our brother, King Richard, and which we retain in our hand (or which are possessed by others, to whom we are bound to warrant them) we shall have respite until the usual term of crusaders; excepting those things about which a plea has been raised, or an inquest made by our order, before our taking of the cross; but as soon as we return from our expedition (or if perchance we desist from the expedition) we will immediately grant full justice therein.

53. We shall have, moreover, the same respite and in the same manner in rendering justice concerning the disafforestation or retention of those forests which Henry our father and Richard our brother afforested, and concerning the wardship of lands which are of the fief of another (namely, such wardships as we have hitherto had by reason of a fief which anyone held of us by knight's service), and concerning abbeys founded on other fiefs than our own, in which the lord of the fee claims to have right; and when we have returned, or if we desist from our expedition, we will immediately grant full justice to all who complain of such things.

54. No one shall be arrested or imprisoned upon the appeal of a woman, for the death of any other than her husband.

55. All fines made with us unjustly and against the law of the land, and all amercements imposed unjustly and against the law of the land, shall be entirely remitted, or else it shall be done concerning them according to the decision of the five-and-twenty barons of whom mention is made below in the clause for securing the peace, or according to the judgment of the majority of the same, along with the aforesaid Stephen, archbishop of Canterbury, if he can be present, and such others as he may wish to bring with him for this purpose, and if he cannot be present the business shall nevertheless proceed without him, provided always that if any one or more of the aforesaid five-and-twenty barons are in a similar suit, they shall be removed as far as concerns this particular judgment, others being substituted in their places after having been selected by the rest of the same five-and-twenty for this purpose only, and after having been sworn.

56. If we have disseised or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise over this, then let it be decided in the marches by the judgment of their peers; for tenements in England according to the law of England, for tenements in Wales according to the law of Wales, and for tenements in the marches according to the law of the marches. Welshmen shall do the same to us and ours.

57. Further, for all those possessions from which any Welshman has, without the lawful judgment of his peers, been disseised or removed by King Henry our father, or King Richard our brother, and which we

retain in our hand (or which are possessed by others, to whom we are bound to warrant them) we shall have respite until the usual term of crusaders; excepting those things about which a plea has been raised or an inquest made by our order before we took the cross; but as soon as we return, (or if perchance we desist from our expedition), we will immediately grant full justice in accordance with the laws of the Welsh and in relation to the aforesaid regions.

58. We will immediately give up the son of Llywelyn and all the hostages of Wales, and the charters delivered to us as security for the peace.

59. We will do towards Alexander, King of Scots, concerning the return of his sisters and his hostages, and concerning his franchises, and his right, in the same manner as we shall do towards our other barons of England, unless it ought to be otherwise according to the charters which we hold from William his father, formerly King of Scots; and this shall be according to the judgment of his peers in our court.

60. Moreover, all these aforesaid customs and liberties, the observance of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed by all of our kingdom, as well clergy as laymen, as far as pertains to them towards their men.

61. Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance for ever, we give and grant to them the under-written security, namely, that the barons choose five-and-twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault toward anyone, or shall have broken any one of the articles of the peace or of this security, and the offence be notified to four barons of the foresaid five-and-twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five-and-twenty barons, and those five-and-twenty barons shall, together with the community of the whole land, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations towards us. And let whoever in the country de-

sires it, swear to obey the orders of the said five-and-twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to every one who wishes to swear, and we shall never forbid anyone to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty-five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect foresaid. And if any one of the five-and-twenty barons shall have died or departed from the land, or be incapacitated in any other manner which would prevent the foresaid provisions being carried out, those of the said twenty-five barons who are left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters, the execution of which is intrusted to these twenty-five barons, if perchance these twenty-five are present and disagree about anything, or if some of them, after being summoned, are unwilling or unable to be present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty-five had concurred in this; and the said twenty-five shall swear that they will faithfully observe all that is aforesaid, and cause it to be observed with all their might. And we shall procure nothing from anyone, directly or indirectly, whereby any part of these concessions and liberties might be revoked or diminished; and if any such thing has been procured, let it be void and null, and we shall never use it personally or by another.

62. And all the ill-will, hatreds, and bitterness that have arisen between us and our men, clergy and lay, from the date of the quarrel, we have completely remitted and pardoned to everyone. Moreover, all trespasses occasioned by the said quarrel, from Easter in the sixteenth year of our reign till the restoration of peace, we have fully remitted to all, both clergy and laymen, and completely forgiven, as far as pertains to us. And, on this head, we have caused to be made for them letters testimonial patent of the lord Stephen, archbishop of Canterbury, of the lord Henry, archbishop of Dublin, of the bishops aforesaid, and of Master Pandulf as touching this security and the concessions aforesaid.

63. Wherefore it is our will, and we firmly enjoin, that the English Church be free, and that the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely and quietly, fully and wholly, for themselves and their heirs, of us and our heirs, in all respects and in all places for ever, as is aforesaid. An oath, moreover, has been taken, as well on our part as on the part of the barons, that all these conditions aforesaid shall be kept in good faith and without evil intent. Given under our hand—the above-named and many others being witnesses—in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of our reign.

4. THE FIRST CHARTER OF VIRGINIA—1606

In colonial days, Americans became accustomed to looking carefully at the language of a written instrument for a determination of questions as to the extent of power and authority in government. The First Charter of Virginia is one of the many written instruments which served as the basis for colonial government. The reader will see in the charter below provisions for certain governmental councils. Those familiar with language used by lawyers in the twentieth century will find an interesting likeness between many words and phrases used in charters of the early seventeenth century and some that are used in deeds conveying title to land today. This document is taken from Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, Vol. VII (Washington: Government Printing Office, 1909).

James, by the Grace of God, King of *England, Scotland, France and Ireland*, Defender of the Faith, &c. Whereas our loving and well-disposed Subjects, Sir *Thomas Gates*, and Sir *George Somers*, Knights, *Richard Hackluit*, Clerk, Prebendary of *Westminster*, and *Edward-Maria Wingfield*, *Thomas Hanham*, and *Raleigh Gilbert*, Esqrs. *William Parker*, and *George Popham*, Gentlemen, and divers others of our loving Subjects, have been humble Suitors unto us, that We would vouchsafe unto them our Licence, to make Habitation, Plantation, and to deduce a colony of sundry of our People into that part of *America* commonly called *Virginia*, and other parts and Territories in *America*, either appertaining unto us, or which are not now actually possessed by any *Christian* Prince or People, situate, lying, and being all along the Sea Coasts, between four and thirty Degrees of *Northerly* Latitude from the Equinoctial Line, and five and forty Degrees of the same Latitude, and in the main Land between the same four and thirty and five and forty Degrees, and the Islands thereunto adjacent, or within one hundred Miles of the Coast thereof;

And to that End, and for the more speedy Accomplishment of their said intended Plantation and Habitation there, are desirous to divide themselves into two several Colonies and Companies; the one consisting of certain Knights, Gentlemen, Merchants, and other Adventurers, of our City of *London* and elsewhere, which are, and from time to time shall be, joined unto them, which do desire to begin their Plantation and Habitation in some fit and convenient Place, between four and thirty and one and forty Degrees of the said Latitude, alongst the Coasts of *Virginia*, and the Coasts of *America* aforesaid: And the other consisting of sundry Knights, Gentlemen, Merchants, and other Adventurers, of our Cities of *Bristol* and *Exeter*, and of our Town of *Plimouth*, and of other Places, which do join themselves unto that Colony, which do desire to begin their Plantation and Habitation in some fit and convenient

Place, between eight and thirty Degrees and five and forty Degrees of the said Latitude, all alongst the said Coasts of *Virginia* and *America*, as that Coast lyeth:

We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of *Christian* Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government: DO, by these our Letters Patents, graciously accept of, and agree to, their humble and well-intended Desires;

And do therefore, for Us, our Heirs, and Successors, Grant and agree, that the said Sir *Thomas Gates*, Sir *George Somers*, *Richard Hackluit*, and *Edward-Maria Wingfield*, Adventurers of and for our City of *London*, and all such others, as are, or shall be, joined unto them of that Colony, shall be called the *first Colony*; And they shall and may begin their said first Plantation and Habitation, at any Place upon the said Coast of *Virginia* or *America*, where they shall think fit and convenient, between the said four and thirty and one and forty Degrees of the said Latitude; And that they shall have all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the said first Seat of their Plantation and Habitation by the Space of fifty Miles of *English* Statute Measure, all along the said Coast of *Virginia* and *America*, towards the *West* and *Southwest*, as the Coast lyeth, with all the Islands within one hundred Miles directly over against the same Sea Coast; And also all the Lands, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Waters, Marshes, Fishings, Commodities, and Hereditaments, whatsoever, from the said Place of their first Plantation and Habitation for the space of fifty like *English* Miles, all alongst the said Coasts of *Virginia* and *America*, towards the *East* and *Northeast*, or towards the *North*, as the Coast lyeth, together with all the Islands within one hundred Miles, directly over against the said Sea Coast; And also all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the same fifty Miles every way on the Sea Coast, directly into the main Land by the Space of one hundred like *English* Miles; And shall and may inhabit and remain there; and shall and may also build and fortify within any the same, for their better Safeguard and Defence, according to their best Discretion, and the Discretion of the Council of that Colony; And that no other of our Subjects shall be permitted, or suffered, to plant or inhabit behind, or on the Backside of them, towards the main Land, without the Express License or Consent of the Council of that Colony, thereunto in Writing first had and obtained.

And we do likewise, for Us, our Heirs, and Successors, by these

Presents, Grant and agree, that the said *Thomas Hanham*, and *Ralegh Gilbert*, *William Parker*, and *George Popham*, and all others of the Town of *Plimouth* in the County of *Devon*, or elsewhere, which are, or shall be, joined unto them of that Colony, shall be called the *second Colony*; And that they shall and may begin their said Plantation and Seat of their first Abode and Habitation, at any Place upon the said Coast of *Virginia* and *America*, where they shall think fit and convenient, between eight and thirty Degrees of the said Latitude, and five and forty Degrees of the same Latitude; And that they shall have all the Lands, Soils, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the first Seat of their Plantation and Habitation by the Space of Fifty like *English Miles*, as is aforesaid, all alongst the said Coasts of *Virginia* and *America*, towards the *West* and *Southwest*, or towards the *South*, as the Coast lyeth, and all the Islands within one hundred Miles, directly over against the said Sea Coast; And also all the Lands, Soils, Grounds, Havens, Ports, Rivers, Mines, Minerals, Woods, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the said Place of their first Plantation and Habitation for the Space of fifty like Miles, all alongst the said Coast of *Virginia* and *America*, towards the *East* and *Northeast*, or towards the *North*, as the Coast lyeth, and all the Islands also within one hundred Miles directly over against the same Sea Coast; And also all the Lands, Soils, Grounds, Havens, Ports, Rivers, Woods, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever, from the same fifty Miles every way on the Sea Coast, directly into the main Land, by the Space of one hundred like *English Miles*; And shall and may inhabit and remain there; and shall and may also build and fortify within any the same for their better Safe-guard, according to their best Discretion, and the Discretion of the Council of that Colony; And that none of our Subjects shall be permitted, or suffered, to plant or inhabit behind, or on the back of them, towards the main Land, without express Licence of the Council of that Colony, in Writing thereunto first had and obtained.

Provided always, and our Will and Pleasure herein is, that the Plantation and Habitation of such of the said Colonies, as shall last plant themselves, as aforesaid, shall not be made within one hundred like *English Miles* of the other of them, that first began to make their Plantation, as aforesaid.

And we do also ordain, establish, and agree, for Us, our Heirs, and Successors, that each of the said Colonies shall have a Council, which shall govern and order all Matters and Causes, which shall arise, grow, or happen, to or within the same several Colonies, according to such Laws, Ordinances, and Instructions, as shall be, in that behalf, given and signed with Our Hand or Sign Manual, and pass under the Privy Seal of our Realm of *England*; Each of which Councils shall consist of thirteen Persons, to be ordained, made, and removed, from time to time, according

as shall be directed and comprised in the same instructions; And shall have a several Seal, for all Matters that shall pass or concern the same several Councils; Each of which Seals, shall have the King's Arms engraven on the one Side thereof, and his Portraiture on the other; And that the Seal for the Council of the said first Colony shall have engraven round about, on the one Side, these Words; *Sigillum Regis Magnae Britanniae, Franciae, & Hiberniae*; on the other Side this Inscription round about; *Pro Concilio primae Coloniae Virginiae*. And the Seal for the Council of the said second Colony shall also have engraven, round about the one Side thereof, the aforesaid Words; *Sigillum Regis Magnae, Britanniae, Franciae, & Hiberniae*; and on the other Side; *Pro Concilio secundae Coloniae Virginiae*:

And that also there shall be a Council, established here in *England*, which shall, in like manner, consist of thirteen Persons, to be, for that Purpose, appointed by Us, our Heirs and Successors, which shall be called our *Council of Virginia*; And shall, from time to time, have the superior Managing and Direction, only of and for all Matters that shall or may concern the Government, as well of the said several Colonies, as of and for any other Part or Place, within the aforesaid Precincts of four and thirty and five and forty Degrees abovementioned; Which Council shall, in like manner, have a Seal, for Matters concerning the Council or Colonies, with the like Arms and Portraiture, as aforesaid, with this inscription, engraven round about on the one Side; *Sigillum Regis Magnae Britanniae, Franciae, & Hiberniae*; and round about on the other Side, *Pro Concilio suo Virginiae*.

And moreover, we do Grant and agree, for Us, our Heirs and Successors; that that the said several Councils of and for the said several Colonies, shall and lawfully may, by Virtue hereof, from time to time, without any Interruption of Us, our Heirs or Successors, give and take Order, to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, as well within any Part of their said several Colonies, as of the said main Lands on the Backside of the same Colonies; And to Have and enjoy the Gold, Silver, and Copper, to be gotten thereof, to the Use and Behoof of the same Colonies, and the Plantations thereof; Yielding therefore to Us, our Heirs and Successors, the fifth Part only of all the same Gold and Silver, and the fifteenth Part of all the same Copper, so to be gotten or had, as is aforesaid, without any other Manner of Profit or Account, to be given or yielded to Us, our Heirs, or Successors, for or in Respect of the same:

And that they shall, or lawfully may, establish and cause to be made a Coin, to pass current there between the people of those several Colonies, for the more Ease of Traffick and Bargaining between and amongst them and the Natives there, of such Metal, and in such Manner and Form, as the said several Councils there shall limit and appoint.

And we do likewise, for Us, our Heirs, and Successors, by these Presents, give full Power and Authority to the said Sir *Thomas Gates*, . . .

and *George Popham*, and to every of them, and to the said several Companies, Plantations, and Colonies, that they, and every of them, shall and may, at all and every time and times hereafter, have, take, and lead in the said Voyage, and for and towards the said several Plantations, and Colonies, and to travel thitherward, and to abide and inhabit there, in every the said Colonies and Plantations, such and so many of our Subjects, as shall willingly accompany them or any of them, in the said Voyages and Plantations; With sufficient Shipping, and Furniture of Armour, Weapons, Ordinance, Powder, Victual, and all other things, necessary for the said Plantations, and for their Use and Defence there: Provided always, that none of the said Persons be such, as shall hereafter be specially restrained by Us, our Heirs, or Successors.

Moreover, we do, by these Presents, for Us, our Heirs, and Successors, Give and Grant Licence unto the said Sir *Thomas Gates*, . . . and *George Popham*, and to every of the said Colonies, that they, and every of them, shall and may, from time to time, and at all times forever hereafter, for their several Defences, encounter, expulse, repel, and resist, as well by Sea as by Land, by all Ways and Means whatsoever, all and every such Person or Persons, as without the especial Licence of the said several Colonies and Plantations, shall attempt to inhabit within the said several Precincts and Limits of the said several Colonies and Plantations, or any of them, or that shall enterprise or attempt, at any time hereafter, the Hurt, Detriment, or Annoyance, of the said several Colonies or Plantations:

Giving and granting, by these Presents, unto the said Sir *Thomas Gates*, . . . and *George Popham*, and their Associates of the said second Colony, and to every of them, from time to time, and at all times for ever hereafter, Power and Authority to take and surprise, by all Ways and Means whatsoever, all and every Person and Persons, with their Ships, Vessels, Goods, and other Furniture, which shall be found trafficking, into any Harbour or Harbours, Creek or Creeks, or Place, within the Limits or Precincts of the said several Colonies and Plantations, not being of the same Colony, until such time, as they, being of any Realms, or Dominions under our Obedience, shall pay, or agree to pay, to the Hands of the Treasurer of that Colony, within whose Limits and Precincts they shall so traffick, two and a half upon every Hundred, of any thing so by them trafficked, bought, or sold; And being Strangers, and not Subjects under our Obedience, until they shall pay five upon every Hundred, of such Wares and Merchandises, as they shall traffick, buy, or sell, within the Precincts of the said several Colonies, wherein they shall so traffick, buy, or sell, as aforesaid; Which Sums of Money, or Benefit, as aforesaid, for and during the Space of one and twenty Years, next ensuing the Date hereof, shall be wholly employed to the Use, Benefit, and Behoof of the said several Plantations, where such Traffick shall be made; And after the said one and twenty Years ended, the same shall be taken to the Use of Us, our Heires, and Successors, by such Officers

and Ministers as by Us, our Heirs, and Successors, shall be thereunto assigned or appointed.

And we do further, by these Presents, for Us, our Heirs and Successors, Give and Grant unto the said Sir *Thomas Gates*, Sir *George Somers*, *Richard Hackluit*, and *Edward-Maria Wingfield*, and to their Associates of the said first Colony and Plantation, and to the said *Thomas Hanham*, *Raleigh Gilbert*, *William Parker*, and *George Popham*, and their Associates of the said second Colony and Plantation, that they, and every of them, by their Deputies, Ministers, and Factors, may transport the Goods, Chattels, Armour, Munition, and Furniture, needful to be used by them, for their said Apparel, Food, Defence, or otherwise in Respect of the said Plantations, out of our Realms of *England* and *Ireland*, and all other our Dominions, from time to time, for and during the Time of seven Years, next ensuing the Date hereof, for the better Relief of the said several Colonies and Plantations, without any Customs, Subsidy, or other Duty, unto Us, our Heirs, or Successors, to be yielded or payed for the same.

Also we do, for Us, our Heirs, and Successors, Declare, by these Presents, that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall Have and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions.

Moreover, our gracious Will and Pleasure is, and we do, by these Presents, for Us, our Heirs, and Successors, declare and set forth, that if any Person or Persons, which shall be of any of the said Colonies and Plantations, or any other, which shall traffick to the said Colonies and Plantations, or any of them, shall, at any time or times hereafter, transport any Wares, Merchandises, or Commodities, out of any of our Dominions, with a Pretence to land, sell, or otherwise dispose of the same, within any the Limits and Precincts of any of the said Colonies and Plantations, and yet nevertheless, being at Sea, or after he hath landed the same within any of the said Colonies and Plantations, shall carry the same into any other Foreign Country, with a Purpose there to sell or dispose of the same, without the Licence of Us, our Heirs, and Successors, in that Behalf first had and obtained; That then, all the Goods and Chattels of such Person or Persons, so offending and transporting, together with the said Ship or Vessel, wherein such Transportation was made, shall be forfeited to Us, our Heirs, and Successors.

Provided always, and our Will and Pleasure is, and we do hereby declare to all Christian Kings, Princes, and States, that if any Person or Persons which shall hereafter be of any of the said several Colonies and Plantations, or any other, by his, their, or any of their Licence and

Appointment, shall, at any Time or Times hereafter, rob or spoil, by Sea or Land, or do any Act of unjust and unlawful Hostility to any the Subjects of Us, our Heirs, or Successors, or any the Subjects of any King, Prince, Ruler, Governor, or State, being then in League or Amitie with Us, our Heirs, or Successors, and that upon such Injury, or upon just Complaint of such Prince, Ruler, Governor, or State, or their Subjects, We, our Heirs, or Successors, shall make open Proclamation, within any of the Ports of our Realm of *England*, commodious for that purpose, That the said Person or Persons, having committed any such robbery, or Spoil, shall, within the term to be limited by such Proclamations, make full Restitution or Satisfaction of all such Injuries done, so as the said Princes, or others so complaining, may hold themselves fully satisfied and contented; And, that if the said Persons or Persons, having committed such Robbery or Spoil, shall not make, or cause to be made Satisfaction accordingly, within such Time so to be limited, That then it shall be lawful to Us, our Heirs, and Successors, to put the said Person or Persons, having committed such Robbery or Spoil, and their Procurers, Abettors, and Comforters, out of our Allegiance and Protection; And that it shall be lawful and free, for all Princes, and others to pursue with hostility the said offenders, and every of them, and their and every of their Procurers, Aiders, abettors, and comforters, in that behalf.

And finally, we do for Us, our Heirs, and Successors; Grant and agree, to and with the said Sir *Thomas Gates*, Sir *George Somers*, *Richard Hackluit*, *Edward-Maria Wingfield*, and all others of the said first colony, that We, our Heirs and Successors, upon Petition in that Behalf to be made, shall, by Letters Patent under the Great Seal of *England*, Give and Grant, unto such Persons, their Heirs and Assigns, as the Council of that Colony, or the most part of them, shall, for that Purpose, nominate and assign all the lands, Tenements, and Hereditaments, which shall be within the Precincts limited for that Colony, as is aforesaid, To Be Holden of Us, our heirs, and Successors, as of our Manor at *East-Greenwich*, in the County of *Kent*, in free and common Soccage only, and not in Capite:

And do in like manner, Grant and Agree, for Us, our Heirs and Successors, to and with the said *Thomas Hanham*, *Ralegh Gilbert*, *William Parker*, and *George Popham*, and all others of the said second Colony, That We, our Heirs, and Successors, upon Petition in that Behalf to be made, shall, by Letters-Patent, under the Great Seal of *England*, Give and Grant, unto such Persons; their Heirs and Assigns, as the Council of that Colony, or the most Part of them, shall for that Purpose nominate and assign, all the Lands, Tenements, and Hereditaments, which shall be within the Precincts limited for that Colony, as is aforesaid, To Be Holden of Us, our Heires, and Successors, as of our Manor of *East-Greenwich*, in the County of *Kent*, in free and common Soccage only, and not in Capite.

All which Lands, Tenements, and Hereditaments, so to be passed by the said several Letters-Patent, shall be sufficient Assurance from the said

Patentees, so distributed and divided amongst the Undertakers for the Plantation of the said several Colonies, and such as shall make their Plantations in either of the said several Colonies, in such Manner and Form, and for such Estates, as shall be ordered and set down by the Council of the said Colony, or the most part of them, respectively, within which the same Lands, Tenements, and Hereditaments shall lye or be; Although express Mention of the true yearly Value or Certainty of the Premises, or any of them, or of any other Gifts or Grants, by Us or any of our Progenitors or Predecessors, to the aforesaid Sir *Thomas Gates*, Knt. Sir *George Somers*, Knt. *Richard Hackluit*, *Edward-Maria Wingfield*, *Thomas Hanham*, *Raleigh Gilbert*, *William Parker*, and *George Popham*, or any of them, heretofore made, in these Presents, is not made; Or any Statute, Act, Ordinance, or Provision, Proclamation, or Restraint, to the contrary hereof had, made, ordained, or any other Thing, Cause, or Matter whatsoever, in any wise notwithstanding. In Witness whereof, we have caused these our Letters to be made Patent; Witness Ourself at *Westminster*, the tenth Day of *April*, in the fourth Year of our Reign of *England*, *France*, and *Ireland*, and of *Scotland* the nine and thirtieth.

LUKIN

Per breve de privato Sigillo.

5. MAYFLOWER COMPACT

There was some question among the passengers on the *Mayflower* as to the governmental jurisdiction under which they would be when they established their colony. To avoid difficulty later, an agreement was drawn up and signed before landing. The Mayflower Compact is included in this volume not only as a very early example of a written document which constituted a basis for government, but also because it was signed by the people who were to be bound by it rather than in the name of the king. A careful consideration of this document suggests that it was not so much the "cornerstone of American democracy" as it was "an instrument to maintain the status quo on the *Mayflower*." An interesting background, in popular style, for the reading of this document will be found in George F. Willison, *Saints and Strangers*. The document below is taken from Thorpe, *Federal and State Constitutions*, Vol. III (Washington: Government Printing Office, 1909).

AGREEMENT BETWEEN THE SETTLERS AT NEW PLYMOUTH

1620

IN the NAME of GOD, AMEN. We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord King *James*, by the Grace of God, of *Great Britain*, *France*, and *Ireland*, King, *Defender of the Faith*, &c. Having undertaken for the Glory of God, and Advancement of the Christian Faith, and the Honour of our King and Country, a Voyage to plant the first Colony in the northern Parts of *Virginia*; Do by these

Presents, solemnly and mutually, in the Presence of God and one another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends afore-said: And by Virtue hereof do enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions, and Officers, from time to time, as shall be thought most meet and convenient for the general Good of the Colony; unto which we promise all due Submission and Obedience. In Witness whereof we have hereunto subscribed our names at *Cape-Cod* the eleventh of *November*, in the Reign of our Sovereign Lord King *James*, of *England*, *France*, and *Ireland*, the eighteenth, and of *Scotland*, the fifty-fourth, *Anno Domini*, 1620.

Mr. John Carver,	Mr. Samuel Fuller,	Edward Tilly,
Mr. William Bradford,	Mr. Christopher Martin,	John Tilly,
Mr. Edward Winslow,	Mr. William Mullins,	Francis Cooke,
Mr. William Brewster,	Mr. William White,	Thomas Rogers,
Isaac Allerton,	Mr. Richard Warren,	Thomas Tinker,
Myles Standish,	John Howland,	John Ridgdale,
John Alden,	Mr. Steven Hopkins,	Edward Fuller,
John Turner,	Digery Priest,	Richard Clark,
Francis Eaton,	Thomas Williams,	Richard Gardiner,
James Chilton,	Gilbert Winslow,	Mr. John Allerton,
John Craxton,	Edmund Margesson,	Thomas English,
John Billington,	Peter Brown,	Edward Doten,
Joses Fletcher,	Richard Britteridge,	Edward Liester.
John Goodman,	George Soule,	

6. THE PETITION OF RIGHT—1628

"The Bible of the English Constitution," according to Lord Chatham, was made up of Magna Carta (1215), the Petition of Right (1628), and the Bill of Rights (1689). Developments both in England and in the colonies served as a background for the Constitution of the United States of America adopted in 1789. The fight for preserving from governmental domination certain liberties of individuals was waged in England for many years, as is indicated in the document below. Students will find it profitable to make careful comparisons of the English and the American documents from 1215 (Magna Carta) to 1789 (Constitution). The text of the Petition of Right is taken from William Stubbs, *Select Charters*, Eighth Edition (Oxford: Clarendon Press, 1900).¹

A. D. 1628. PETITION OF RIGHT.

3 Car. I c. i.

The Petition exhibited to his Majesty by the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, concern-

¹ Used by permission of the Clarendon Press.

ing divers Rights and Liberties of the Subjects, with the King's Majesty's royal answer thereunto in full Parliament.

To the King's Most Excellent Majesty,

Humbly show unto our Sovereign Lord the King, the Lords Spiritual and Temporal, and Commons in Parliament assembled, that whereas it is declared and enacted by a statute made in the time of the reign of King Edward I, commonly called *Statutum de Tallagio non Concedendo*, that no tallage or aid shall be laid or levied by the king or his heirs in this realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other the freemen of the commonalty of this realm; and by authority of parliament holden in the five-and-twentieth year of the reign of King Edward III, it is declared and enacted, that from thenceforth no person should be compelled to make any loans to the king against his will, because such loans were against reason and the franchise of the land; and by other laws of this realm it is provided, that none should be charged by any charge or imposition called a benevolence, nor by such like charge; by which statutes before mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent, in parliament.

II. Yet nevertheless of late divers commissions directed to sundry commissioners in several counties, with instructions, have issued; by means whereof your people have been in divers places assembled, and required to lend certain sums of money unto your Majesty, and many of them, upon their refusal so to do, have had an oath administered unto them not warrantable by the laws or statutes of this realm, and have been constrained to become bound and make appearance and give utterance before your Privy Council and in other places, and others of them have been therefore imprisoned, confined, and sundry other ways molested and disquieted; and divers other charges have been laid and levied upon your people in several counties by lord lieutenants, deputy lieutenants, commissioners for musters, justices of peace and others, by command or direction from your Majesty, or your Privy Council, against the laws and free customs of the realm.

III. And whereas also by the statute called 'The Great Charter of the liberties of England,' it is declared and enacted, that no freeman may be taken or imprisoned or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.

IV. And in the eight-and-twentieth year of the reign of King Edward III, it was declared and enacted by authority of parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law.

V. Nevertheless, against the tenor of the said statutes, and other the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

VI. And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and customs of this realm, and to the great grievance and vexation of the people.

VII. And whereas also by authority of parliament, in the five-and-twentieth year of the reign of King Edward III, it is declared and enacted, that no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by acts of parliament: and whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm; nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanour whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial.

VIII. By pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been judged and executed.

IX. And also sundry grievous offenders, by colour thereof claiming an exemption, have escaped the punishments due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborne to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by martial law, and by authority of such commissions as aforesaid; which commissions, and all other of

like nature, are wholly and directly contrary to the said laws and statutes of this your realm.

X. They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of parliament; and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusal thereof; and that no freeman, in any such manner as is before mentioned, be imprisoned or detained; and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burdened in time to come; and that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land.

XI. All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom.

Qua quidem petitione lecta et plenius intellecta per dictum dominum regem taliter est responsum in pleno parlamento, viz. Soit droit fait come est désiré.—(Statutes of the Realm, v. 24, 25.)

7. THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND

1643–1684

Prior to the Declaration of Independence, there were serious attempts to draw together into some form of union the English-speaking colonies in America. The document presented below gives the basis on which certain colonies in New England worked together for a number of years. There were later efforts to unite the colonies in North America, such as Penn's Plan of Union in 1697 and the Albany Plan of Union suggested by Benjamin Franklin in 1754. Readers may be particularly interested in comparing the provisions as to run-away servants and escaped prisoners contained in this document with the provisions of Article IV, Section 2, of the Constitution adopted in 1789. The text of the document is taken from Thorpe, *Federal and State Constitutions*, Vol. I (Washington: Government Printing Office, 1909).

The Articles of Confederation between the Plantations under the Government of the Massachusetts, the Plantations under the Government of New Plymouth, the Plantations under the Government of Connecticut, and the Government of New Haven with the Plantations in Combination therewith:

Whereas we all came into these parts of America with one and the same end and aim, namely, to advance the Kingdom of our Lord Jesus Christ and to enjoy the liberties of the Gospel in purity with peace; and whereas in our settling (by a wise providence of God) we are further dispersed upon the sea coasts and rivers than was at first intended, so that we can not according to our desire with convenience communicate in one government and jurisdiction; and whereas we live encompassed with people of several nations and strange languages which hereafter may prove injurious to us or our posterity. And forasmuch as the natives have formerly committed sundry insolence and outrages upon several Plantations of the English and have of late combined themselves against us: and seeing by reason of those sad distractions in England which they have heard of, and by which they know we are hindered from that humble way of seeking advice, or reaping those comfortable fruits of protection, which at other times we might well expect. We therefore do conceive it our bounden duty, without delay to enter into a present Consociation amongst ourselves, for mutual help and strength in all our future concerns: That, as in nation and religion, so in other respects, we be and continue one according to the tenor and true meaning of the ensuing articles: Wherefore it is fully agreed and concluded by and between the parties or Jurisdictions above named, and they jointly and severally do by these presents agree and conclude that they all be and henceforth be called by the name of the United Colonies of New England.

2. The said United Colonies for themselves and their posterities do jointly and severally hereby enter into a firm and perpetual league of friendship and amity for offence and defence, mutual advice and succor upon all just occasions both for preserving and propagating the truth and liberties of the Gospel and for their own mutual safety and welfare.

3. It is further agreed that the Plantations which at present are or hereafter shall be settled within the limits of the Massachusetts shall be forever under the Massachusetts and shall have peculiar jurisdiction among themselves in all cases as an entire body, and that Plymouth, Connecticut, and New Haven shall each of them have like peculiar jurisdiction and government within their limits; and in reference to the Plantations which already are settled, or shall hereafter be erected, or shall settle within their limits respectively; provided no other Jurisdiction shall hereafter be taken in as a distinct head or member of this Confederation, nor shall any other Plantation or Jurisdiction in present being, and not already in combination or under the jurisdiction of any of these Confederates, be received by any of them; nor shall any two of the Con-

federates join in one Jurisdiction without consent of the rest, which consent to be interpreted as is expressed in the sixth article ensuing.

4. It is by these Confederates agreed that the charge of all just wars, whether offensive or defensive, upon what part or member of this Confederation soever they fall, shall both in men, provisions, and all other disbursements be borne by all the parts of this Confederation in different proportions according to their different ability in manner following, namely, that the Commissioners for each Jurisdiction from time to time, as there shall be occasion, bring a true account and number of all their males in every Plantation, or any way belonging to or under their several Jurisdictions, of what quality or condition soever they be, from sixteen years old to threescore, being inhabitants there. And that according to the different numbers which from time to time shall be found in each Jurisdiction upon a true and just account, the service of men and all charges of the war be borne by the poll: each Jurisdiction or Plantation being left to their own just course and custom of rating themselves and people according to their different estates with due respects to their qualities and exemptions amongst themselves though the Confederation take no notice of any such privilege: and that according to their different charge of each Jurisdiction and Plantation the whole advantage of the war (if it please God so to bless their endeavors) whether it be in lands, goods, or persons, shall be proportionably divided among the said Confederates.

5. It is further agreed, that if any of these Jurisdictions or any Plantation under or in combination with them, be invaded by any enemy whomsoever, upon notice and request of any three magistrates of that Jurisdiction so invaded, the rest of the Confederates without any further meeting or expostulation shall forthwith send aid to the Confederate in danger but in different proportions; namely, the Massachusetts an hundred men sufficiently armed and provided for such a service and journey, and each of the rest, forty-five so armed and provided, or any less number, if less be required according to this proportion. But if such Confederate in danger may be supplied by their next Confederates, not exceeding the number hereby agreed, they may crave help there, and seek no further for the present: the charge to be borne as in this article is expressed: and at the return to be victualled and supplied with powder and shot for their journey (if there be need) by that Jurisdiction which employed or sent for them; but none of the Jurisdictions to exceed these numbers until by a meeting of the Commissioners for this Confederation a greater aid appear necessary. And this proportion to continue till upon knowledge of greater numbers in each Jurisdiction which shall be brought to the next meeting, some other proportion be ordered. But in any such case of sending men for present aid, whether before or after such order or alteration, it is agreed that at the meeting of the Commissioners for this Confederation, the cause of such war or invasion be duly considered: and if it appear that the fault lay in the parties so invaded then that Jurisdiction or Plantation make just satisfaction, both to the invaders whom

they have injured, and bear all the charges of the war themselves, without requiring any allowance from the rest of the Confederates towards the same. And further that if any Jurisdiction see any danger of invasion approaching, and there be time for a meeting, that in such a case three magistrates of the Jurisdiction may summon a meeting at such convenient place as themselves shall think meet, to consider and provide against the threatened danger; provided when they are met they may remove to what place they please; only whilst any of these four Confederates have but three magistrates in their Jurisdiction, their requests, or summons, from any two of them shall be accounted of equal force with the three mentioned in both the clauses of this article, till there be an increase of magistrates there.

6. It is also agreed, that for the managing and concluding of all affairs proper, and concerning the whole Confederation two Commissioners shall be chosen by and out of each of these four Jurisdictions: namely, two for the Massachusetts, two for Plymouth, two for Connecticut, and two for New Haven, being all in Church-fellowship with us, which shall bring full power from their several General Courts respectively to hear, examine, weigh, and determine all affairs of our war, or peace, leagues, aids, charges, and numbers of men for war, division of spoils and whatsoever is gotten by conquest, receiving of more Confederates for Plantations into combination with any of the Confederates, and all things of like nature, which are the proper concomitants or consequents of such a Confederation for amity, offence, and defence: not intermeddling with the government of any of the Jurisdictions, which by the third article is preserved entirely to themselves. But if these eight Commissioners when they meet shall not all agree yet it [is] concluded that any six of the eight agreeing shall have power to settle and determine the business in question. But if six do not agree, that then such propositions with their reasons so far as they have been debated, be sent and referred to the four General Courts; namely, the Massachusetts, Plymouth, Connecticut, and New Haven; and if at all the said General Courts the business so referred be concluded, then to be prosecuted by the Confederates and all their members. It is further agreed that these eight Commissioners shall meet once every year besides extraordinary meetings (according to the fifth article) to consider, treat, and conclude of all affairs belonging to this Confederation, which meeting shall ever be the first Thursday in September. And that the next meeting after the date of these presents, which shall be accounted the second meeting, shall be at Boston in the Massachusetts, the third at Hartford, the fourth at New Haven, the fifth at Plymouth, the sixth and seventh at Boston; and then Hartford, New Haven, and Plymouth, and so in course successively, if in the meantime some middle place be not found out and agreed on, which may be commodious for all the Jurisdictions.

7. It is further agreed that at each meeting of these eight Commissioners, whether ordinary or extraordinary, they or six of them agreeing as

before, may choose their President out of themselves whose office and work shall be to take care and direct for order and a comely carrying on of all proceedings in the present meeting: but he shall be invested with no such power or respect, as by which he shall hinder the propounding or progress of any business, or any way cast the scales otherwise than in the precedent article is agreed.

8. It is also agreed that the Commissioners for this Confederation hereafter at their meetings, whether ordinary or extraordinary, as they may have commission or opportunity, do endeavor to frame and establish agreements and orders in general cases of a civil nature, wherein all the Plantations are interested, for preserving of peace among themselves, for preventing as much as may be all occasion of war or differences with others, as about the free and speedy passage of justice in every Jurisdiction, to all the Confederates equally as to their own, receiving those that remove from one Plantation to another without due certificate, how all the Jurisdictions may carry it towards the Indians, that they neither grow insolent nor be injured without due satisfaction, lest war break in upon the Confederates through such miscarriages. It is also agreed that if any servant run away from his master into any other of these confederated Jurisdictions, that in such case, upon the certificate of one magistrate in the Jurisdiction out of which the said servant fled, or upon other due proof; the said servant shall be delivered, either to his master, or any other that pursues and brings such certificate or proof. And that upon the escape of any prisoner whatsoever, or fugitive for any criminal cause, whether breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the Jurisdiction out of which the escape is made, that he was a prisoner, or such an offender at the time of the escape, the magistrates, or some of them of that Jurisdiction where for the present the said prisoner or fugitive abideth, shall forthwith grant such a warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursues him. And if there be help required, for the safe returning of any such offender, then it shall be granted to him that craves the same, he paying the charges thereof.

9. And for that the justest wars may be of dangerous consequence, especially to the smaller Plantations in these United Colonies, it is agreed that neither the Massachusetts, Plymouth, Connecticut, nor New Haven, nor any of the members of them, shall at any time hereafter begin, undertake, or engage themselves, or this Confederation, or any part thereof in any war whatsoever (sudden exigencies, with the necessary consequents thereof excepted), which are also to be moderated as much as the case will permit, without the consent and agreement of the forementioned eight Commissioners, or at least six of them, as in the sixth article is provided: and that no charge be required of any of the Confederates, in case of a defensive war, till the said Commissioners have met, and approved the justice of the war, and have agreed upon the sum of money to be levied,

which sum is then to be paid by the several Confederates in proportion according to the fourth article.

10. That in extraordinary occasions, when meetings are summoned by three magistrates of any Jurisdiction, or two as in the fifth article, if any of the Commissioners come not, due warning being given or sent, it is agreed that four of the Commissioners shall have power to direct a war which cannot be delayed, and to send for due proportions of men out of each Jurisdiction, as well as six might do if all met; but not less than six shall determine the justice of the war, or allow the demands or bills of charges, or cause any levies to be made for the same.

11. It is further agreed that if any of the Confederates shall hereafter break any of these present articles, or be any other ways injurious to any one of the other Jurisdictions; such breach of agreement or injury shall be duly considered and ordered by the Commissioners for the other Jurisdictions, that both peace and this present Confederation may be entirely preserved without violation.

12. Lastly, this perpetual Confederation, and the several articles and agreements thereof being read and seriously considered, both by the General Court for the Massachusetts, and by the Commissioners for Plymouth, Connecticut, and New Haven, were fully allowed and confirmed by three of the forenamed Confederates, namely, the Massachusetts, Connecticut, and New Haven; only the Commissioners for Plymouth having no commission to conclude, desired respite until they might advise with their General Court; whereupon it was agreed and concluded by the said Court of the Massachusetts, and the Commissioners for the other two Confederates, that, if Plymouth consent, then the whole treaty as it stands in these present articles is, and shall continue, firm and stable without alteration: but if Plymouth come not in yet the other three Confederates do by these presents confirm the whole Confederation, and all the articles thereof; only in September next when the second meeting of the Commissioners is to be at Boston, new consideration may be taken of the sixth article, which concerns number of Commissioners for meeting and concluding the affairs of this Confederation to the satisfaction of the Court of the Massachusetts, and the Commissioners for the other two Confederates, but the rest to stand unquestioned.

In testimony whereof, the General Court of the Massachusetts by their Secretary, and the Commissioners for Connecticut and New Haven, have subscribed these present articles of this nineteenth of the third month, commonly called May, Anno Domini 1643.

At a meeting of the Commissioners for the Confederation held at Boston the 7th of September, it appearing that the General Court of New Plymouth and the several townships thereof have read, considered, and approved these Articles of Confederation, as appeareth by commission of their General Court bearing date the 29th of August, 1643, to Mr. Edward Winslow and Mr. William Collier to ratify and confirm the same on their behalf: we therefore, the Commissioners for the Massachusetts, Connecti-

cut, and New Haven, do also from our several Governments subscribe unto them.

8. BILL OF RIGHTS—1689

The Glorious Revolution in England was of great significance in the background of American Government. The success of this English revolution resulted in the calling of William and Mary to the throne, clearly establishing the supremacy of parliament over the king. The Bill of Rights of 1689 is an evidence of this victory. Relationship of this document to American government can be seen in provisions of the Constitution of the United States of America: Article I, Sections 2, 5, 7, 8; Article III, Sections 2, 3; and Amendments I–VIII. The excerpt below is taken from William Stubbs, *Select Charters*, Eighth Edition (Oxford: Clarendon Press, 1900).¹

A. D. 1689. BILL OF RIGHTS

I Will. & Mar. Sess. 2. c. 2.

Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did, upon the thirteenth day of February, in the year of our Lord one thousand six hundred eighty-eight, present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, in the words following; viz.:—

Whereas the late King James II, by the assistance of diverse evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom:—

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the same assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court, called the Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown, by pretence of prerogative, for other time, and in other manner than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants, to be dis-

¹ Used by permission of the Clarendon Press.

armed, at the same time when Papists were both armed and employed contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable only in Parliament; and by diverse other arbitrary and illegal courses.

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly diverse jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King James II having abdicated the government, and the throne being thereby vacant, his Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal, and diverse principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal, being Protestants, and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons as represent them, as were of right to be sent to Parliament, to meet and sit at Westminster upon the two-and-twentieth day of January, in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws and liberties might not again be in danger of being subverted; upon which letters, elections have been accordingly made.

And thereupon the said Lords Spiritual and Temporal, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like cases have usually done), for the vindicating and asserting their ancient rights and liberties, declare:—

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners

for Ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliament ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highness the Prince of Orange, as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence that his said Highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties:

II. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster, do resolve, that William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the Crown and royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said

Prince and Princess, during their joint lives; and after their deceases, the said Crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of the said Prince of Orange. And the Lords Spiritual and Temporal, and Commons, do pray the said Prince and Princess to accept the same accordingly.

* * * * *

III

Influential Writers in Background



9. JOHN LOCKE—1690
Two Treatises of Government
10. BARON DE MONTESQUIEU—1748
The Spirit of Laws
11. SAMUEL ADAMS—1772
The Rights of the Colonists
12. THOMAS PAINE—1776
Common Sense

EXPLANATIONS of and theories about political institutions set out by widely read writers had considerable influence on the American people and their leaders who were responsible for the formulation and adoption of the Constitution of 1789. Excerpts from the works of only a few of the most outstanding writers are included in this volume.

INFLUENTIAL WRITERS IN BACKGROUND



9. JOHN LOCKE—1690

John Locke (1632–1704), an Englishman, was the interpreter and philosopher of the Glorious Revolution. He attended college at Christ Church, Oxford. He served as a Lecturer at Oxford (1661–1664). His interests included Greek, rhetoric, medicine, chemistry, meteorology, and philosophy. His writings were not limited to government, but it is because of what he said about government that it is appropriate to include excerpts from his work in a study of American government. In 1689, he drafted a constitution for the Carolina colonists. Following the Glorious Revolution and the passage by Parliament of the Bill of Rights of 1689, he published in 1690 his *Two Treatises of Government* (or *Two Treatises on Civil Government*, as the book is sometimes entitled). Vernon Louis Parrington in *The Colonial Mind* (1927) called this book “the textbook of the American Revolution.”

Students will find interesting a careful comparison of the language of the Declaration of Independence of 1776 with some of the paragraphs of Locke below, as those numbered 95, 149, and 151. Reading the provisions as to Congress found in the Constitution of 1789 in comparison with Chapter XI below will be fruitful. It is also worth the time it takes to read paragraph 141 below along with what the Supreme Court of the United States said in 1935 about delegation of legislative power in the case of *A. L. A. Schechter Poultry Corp. et al. v. United States* (no. 69 *infra*).

Much attention has been given to Locke's views on the state of nature, the law of nature or natural law, natural rights, the social contract, and government under and through laws. Students who desire to read further on such points will find appropriate readings in many outstanding writings of which only a few will be mentioned. The *Leviathan*, by Thomas Hobbes (1651), and *The Social Contract*, by Jean Jacques Rousseau (1762), will furnish contrasting views as to the state of nature, the social contract, and other points. Thomas Aquinas, who wrote *On the Governance of Rulers* and other works in the thirteenth century, and Richard Hooker, with his *Ecclesiastical Polity* written about 1592–1597, seem to have influenced considerably the thinking of Locke. Cicero, who was influenced by the Greek Stoics, made a splendid statement as to natural law, or the law of nature, in *The Laws* (*De legibus*), published after his death (43 B.C.). Aristotle's *Politics* (c. 322 B.C.) gives a valuable

discussion of constitutional government which is interesting as background for Locke's writing. The excerpts below are taken from Book II of *Two Treatises on Civil Government* by John Locke (London: George Routledge and Sons, 1884).

CHAPTER VIII.

Of the Beginning of Political Societies.

95. Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest: they are left, as they were, in the liberty of the state of Nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.

96. For, when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority. For that which acts any community, being only the consent of the individuals of it, and it being one body, must move one way, it is necessary the body should move that way whither the greater force carries it, which is the consent of the majority, or else it is impossible it should act or continue one body, one community, which the consent of every individual that united into it agreed that it should; and so every one is bound by that consent to be concluded by the majority. And therefore we see that in assemblies empowered to act by positive laws where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course determines as having, by the law of Nature and reason, the power of the whole.

97. And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact if he be left free and under no other ties than he was in before in the state of Nature. For what appearance would there be of any compact? What new engagement if he were no farther tied by any decrees of the society than he himself thought fit and did actually consent to? This would be still as great a liberty as he himself had before his compact, or any one else in the state of Nature, who may submit himself and consent to any acts of it if he thinks fit.

98. For if the consent of the majority shall not in reason be received as the act of the whole, and conclude every individual; nothing but the consent of every individual can make anything to be the act of the whole, which, considering the infirmities of health and avocations of business, which in a number though much less than that of a commonwealth, will necessarily keep many away from the public assembly; and the variety of opinions and contrariety of interests which unavoidably happen in all collections of men, it is next impossible ever to be had. And, therefore, if coming into society be upon such terms, it will be only like Cato's coming into the theatre, *tantum ut exiret*. Such a constitution as this would make the mighty leviathan of a shorter duration than the feeblest creatures, and not let it outlast the day it was born in, which cannot be supposed till we can think that rational creatures should desire and constitute societies only to be dissolved. For where the majority cannot conclude the rest, there they cannot act as one body, and consequently will be immediately dissolved again.

99. Whosoever, therefore, out of a state of Nature unite into a community, must be understood to give up all the power necessary to the ends for which they unite into society to the majority of the community, unless they expressly agreed in any number greater than the majority. And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be, between the individuals that enter into or make up a commonwealth. And thus, that which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of majority, to unite and incorporate into such a society. And this is that, and that only, which did or could give beginning to any lawful government in the world.

CHAPTER IX.

Of the Ends of Political Society and Government.

123. If man in the state of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the

mutual preservation of their lives, liberties and estates, which I call by the general name—property.

124. The great and chief end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property; to which in the state of Nature there are many things wanting.

Remain of happiness (as Const.)

Firstly, There wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them. For though the law of Nature be plain and intelligible to all rational creatures, yet men, being biased by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases.

125. Secondly: in the state of Nature there wants a known and indifferent judge, with authority to determine all differences according to the established law. For every one in that state being both judge and executioner of the law of Nature, men being partial to themselves, passion and revenge is very apt to carry them too far, and with too much heat in their own cases, as well as negligence and unconcernedness, make them too remiss in other men's.

126. Thirdly: in the state of Nature there often wants power to back and support the sentence when right, and to give it due execution. They who by any injustice offended will seldom fail where they are able by force to make good their injustice. Such resistance many times makes the punishment dangerous, and frequently destructive to those who attempt it.

127. Thus mankind, notwithstanding all the privileges of the state of Nature, being but in an ill condition while they remain in it are quickly driven into society. Hence it comes to pass, that we seldom find any number of men live any time together in this state. The inconveniencies that they are therein exposed to by the irregular and uncertain exercise of the power every man has of punishing the transgressions of others, make them take sanctuary under the established laws of government, and therein seek the preservation of their property. It is this makes them so willingly give up every one his single power of punishing to be exercised by such alone as shall be appointed to it amongst them, and by such rules as the community, or those authorized by them to that purpose, shall agree on. And in this we have the original right and rise of both the legislative and executive power as well as of the governments and societies themselves.

128. For in the state of Nature to omit the liberty he has of innocent delights, a man has two powers. The first is to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of Nature; by which law, common to them all, he and all the rest of mankind are one community, make up one society distinct from all other creatures, and were it not for the corruption and viciousness

of degenerate men, there would be no need of any other, no necessity that men should separate from this great and natural community, and associate into lesser combinations. The other power a man has in the state of Nature is the power to punish the crimes committed against that law. Both these he gives up when he joins in a private, if I may so call it, or particular political society, and incorporates into any commonwealth separate from the rest of mankind.

129. The first power—viz., of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require; which laws of the society in many things confine the liberty he had by the law of Nature.

130. Secondly. The power of punishing he wholly gives up, and engages his natural force, which he might before employ in the execution of the law of Nature, by his own single authority, as he thought fit, to assist the executive power of the society as the law thereof shall require. For being now in a new state, wherein he is to enjoy many conveniencies from the labour, assistance, and society of others in the same community, as well as protection from its whole strength, he is to part also with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the society shall require, which is not only necessary but just, since the other members of the society do the like.

131. But though men when they enter into society give up the equality, liberty, and executive power they had in the state of Nature into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require, yet it being only with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse), the power of the society or legislative constituted by them can never be supposed to extend farther than the common good, but is obliged to secure every one's property by providing against those three defects above mentioned that made the state of Nature so unsafe and uneasy. And so, whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people.

CHAPTER XI.

Of the Extent of the Legislative Power.

134. The great end of men's entering into society being the enjoyment of their properties in peace and safety, and the great instrument and means of that being the laws established in that society, the first and fundamental positive law of all commonwealths is the establishing of the legislative power, as the first and fundamental natural law which is to govern even the legislative. . . .

135. Though the legislative, whether placed in one or more, whether it be always in being or only by intervals, though it be the supreme power in every commonwealth; yet, first, it is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself, and nobody has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another. A man, as has been proved, cannot subject himself to the arbitrary power of another; and having, in the state of Nature, no arbitrary power over the life, liberty, or possession of another, but only so much as the law of Nature gave him for the preservation of himself and the rest of mankind, this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this. Their power in the utmost bounds of it is limited to the public good of the society. It is a power that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects; the obligations of the law of Nature cease not in society, but only in many cases are drawn closer, and have, by human laws, known penalties annexed to them to enforce their observation. Thus the law of Nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions must, as well as their own and other men's actions, be conformable to the law of Nature—*i.e.*, to the will of God, of which that is a declaration, and the fundamental law of Nature being the preservation of mankind, no human sanction can be good or valid against it.

136. Secondly, the legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgated standing laws, and known authorized judges. For the law of Nature being unwritten, and so nowhere to be found but in the minds of men, they who, through passion or interest, shall miscite or misapply it, can-

not so easily be convinced of their mistake where there is no established judge; and so it serves not as it ought, to determine the rights and fence the properties of those that live under it, especially where every one is judge, interpreter, and executioner of it too, and that in his own case; and he that has right on his side, having ordinarily but his own single strength, hath not force enough to defend himself from injuries or punish delinquents. To avoid these inconveniencies which disorder men's properties in the state of Nature, men unite into societies that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it by which every one may know what is his. To this end it is that men give up all their natural power to the society they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature.

137. Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of Nature for, and tie themselves up under were it not to preserve their lives, liberties, and fortunes; and by stated rules of right and property to secure their peace and quiet. It cannot be supposed that they should intend, had they a power so to do, to give any one or more an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them; this were to put themselves into a worse condition than the state of Nature, wherein they had a liberty to defend their right against the injuries of others, and were upon equal terms of force to maintain it, whether invaded by a single man or many in combination. Whereas by supposing they have given up themselves to the absolute arbitrary power and will of a legislator, they have disarmed themselves, and armed him to make a prey of them when he pleases; he being in a much worse condition that is exposed to the arbitrary power of one man who has the command of a hundred thousand than he that is exposed to the arbitrary power of a hundred thousand single men, nobody being secure, that his will who has such a command is better than that of other men, though his force be a hundred thousand times stronger. And, therefore, whatever form the commonwealth is under, the ruling power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions, for then mankind will be in a far worse condition than in the state of Nature if they shall have armed one or a few men with the joint power of a multitude, to force them to obey at pleasure the exorbitant and unlimited decrees of their sudden thoughts, or unrestrained, and till that moment, unknown wills, without having any measures set down which may guide and justify their actions. For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established

and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds, and not be tempted by the power they have in their hands to employ it to purposes, and by such measures as they would not have known, and own not willingly.

138. Thirdly, the supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society, which was the end for which they entered into it; too gross an absurdity for any man to own. . . .

140. It is true governments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent—*i.e.*, the consent of the majority, giving it either by themselves or their representatives chosen by them; for if any one shall claim a power to lay and levy taxes on the people by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government. For what property have I in that which another may by right take when he pleases to himself?

141. Fourthly. The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, "We will submit, and be governed by laws made by such men, and in such forms," nobody else can say other men shall make laws for them; nor can they be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them.

142. These are the bounds which the trust that is put in them by the society and the law of God and Nature have set to the legislative power of every commonwealth, in all forms of government. First: They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough. Secondly: These laws also ought to be designed for no other end ultimately but the good of the people. Thirdly: They must not raise taxes on the property of the people without the consent of the people given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by them-

selves. Fourthly: Legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.

CHAPTER XII.

Of the Legislative, Executive, and Federative Power of the Commonwealth.

143. The legislative power is that which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it. Because those laws which are constantly to be executed, and whose force is always to continue, may be made in a little time; therefore there is no need that the legislative should be always in being, not having always business to do. And because it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government. Therefore in well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them to take care that they make them for the public good.

144. But because the laws that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto, therefore it is necessary there should be a power always in being which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated.

145. There is another power in every commonwealth which one may call natural, because it is that which answers to the power every man naturally had before he entered into society. For though in a commonwealth the members of it are distinct persons, still, in reference to one another, and, as such, are governed by the laws of the society, yet, in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of Nature with the rest of mankind, so that the controversies that happen between any man of the society with those that are out of it are managed by the public, and an injury done to a member of their body engages the whole in the reparation of it. So that under this consideration the whole community is one body in the state of Nature in respect of all other states or persons out of its community.

146. This, therefore, contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth, and may be called federative if any one pleases. So the thing be understood, I am indifferent as to the name.

147. These two powers, executive and federative, though they be really distinct in themselves, yet one comprehending the execution of the municipal laws of the society within itself upon all that are parts of it, the other the management of the security and interest of the public without with all those that it may receive benefit or damage from, yet they are always almost united. And though this federative power in the well or ill management of it be of great moment to the commonwealth, yet it is much less capable to be directed by antecedent, standing, positive laws than the executive, and so must necessarily be left to the prudence and wisdom of those whose hands it is in, to be managed for the public good. For the laws that concern subjects one amongst another, being to direct their actions, may well enough precede them. But what is to be done in reference to foreigners depending much upon their actions, and the variation of designs and interests, must be left in great part to the prudence of those who have this power committed to them to be managed by the best of their skill for the advantage of the commonwealth.

148. Though, as I said, the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated and placed at the same time in the hands of distinct persons. For both of them requiring the force of the society for their exercise, it is almost impracticable to place the force of the commonwealth in distinct and not subordinate hands, or that the executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands, which would be apt some time or other to cause disorder and ruin.

CHAPTER XIII.

Of the Subordination of the Powers of the Commonwealth.

149. THOUGH in a constituted commonwealth standing upon its own basis and acting according to its own nature—that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. For all power given with trust for the attaining an end being limited by that end whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security. And thus the community per-

petually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject. For no man or society of men having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another, whenever any one shall go about to bring them into such a slavish condition, they will always have a right to preserve what they have not a power to part with, and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation for which they entered into society. And thus the community may be said in this respect to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place till the government be dissolved.

151. In some commonwealths where the legislative is not always in being, and the executive is vested in a single person who has also a share in the legislative, there that single person, in a very tolerable sense, may also be called supreme; not that he has in himself all the supreme power, which is that of law-making, but because he has in him the supreme execution from whom all inferior magistrates derive all their several subordinate powers, or, at least, the greatest part of them: having also no legislative superior to him, there being no law to be made without his consent, which cannot be expected should ever subject him to the other part of the legislative, he is properly enough in this sense supreme. But yet it is to be observed that though oaths of allegiance and fealty are taken to him, it is not to him as supreme legislator, but as supreme executor of the law made by a joint power of him with others, allegiance being nothing but an obedience according to law, which, when he violates, he has no right to obedience, nor can claim it otherwise than as the public person vested with the power of the law, and so is to be considered as the image, phantom, or representative of the commonwealth, acted by the will of the society declared in its laws, and thus he has no will, no power, but that of the law. But when he quits this representation, this public will, and acts by his own private will, he degrades himself, and is but a single private person without power and without will; the members owing no obedience but to the public will of the society.

10. BARON DE MONTESQUIEU—1748

Charles Louis Secondat de la Brède, Baron de Montesquieu (1689–1755), was a Frenchman of noble lineage. He served twelve years as chief magistrate at Bordeaux. His fame rests principally upon three books: *Persian Letters* (1721), *Considerations on the Causes of the Greatness and Decline of the Romans* (1734), and *The Spirit of Laws* (1748).

While visiting England, Montesquieu developed a deep admiration for the British constitution, and seems to have seen in it a separation of powers which did not exist as completely as he thought. It is his emphasis upon separation of powers and the setting up of checks on the different branches of government that gives him a place of importance in American government. His views as to liberty under law are admirably expressed. Woodrow Wilson said: "The makers of our federal Constitution followed the scheme as they found it expounded in Montesquieu, . . . Our statesmen of the earlier generations quoted no one so often as Montesquieu, . . ." See Wilson's criticism of Montesquieu's theory, no. 80, *infra*.

It is interesting to become familiar with ideas Montesquieu expressed in paragraphs quoted below, not only as to separation of powers and liberty under law, but also with reference to the principles and underlying governmental devices and practices which have been adopted in American state and federal governments, such as bicameral legislatures, the use of the writ of habeas corpus, election of representatives from geographical districts, the veto, impeachment, and the control of finances by the legislature.

The excerpts below are taken from *The Spirit of Laws* by Bañon de Montesquieu.

BOOK XI

OF THE LAWS WHICH ESTABLISH POLITICAL LIBERTY WITH REGARD TO THE CONSTITUTION.

2.—*Different Significations of the word Liberty*

There is no word that admits of more various significations, and has made more varied impresions on the human mind, than that of liberty. Some have taken it as a means of deposing a person on whom they had conferred a tyrannical authority; others for the power of choosing a superior whom they are obliged to obey; others for the right of bearing arms, and of being thereby enabled to use violence; others, in fine, for the privilege of being governed by a native of their own country, or by their own laws. A certain nation for a long time thought liberty consisted in the privilege of wearing a long beard. Some have annexed this name to one form of government exclusive of others: those who had a republican taste applied it to this species of polity; those who liked a monarchical state gave it to monarchy. Thus they have all applied the name of liberty to the government most suitable to their own customs and inclinations: and as in republics the people have not so constant and so present a view of the causes of their misery, and as the magistrates seem to act only in conformity to the laws, hence liberty is generally said to reside in republics, and to be banished from monarchies. In fine, as in democracies the people seem to act almost as they please, this sort of government has

been deemed the most free, and the power of the people has been confounded with their liberty.

3.—*In what Liberty consists*

It is true that in democracies the people seem to act as they please; but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will.

We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.

4.—*The same Subject continued*

Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?

To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits.

5.—*Of the End or View of different Governments*

Though all governments have the same general end, which is that of preservation, yet each has another particular object. Increase of dominion was the object of Rome; war, that of Sparta; religion, that of the Jewish laws; commerce, that of Marseilles; public tranquillity, that of the laws of China; navigation, that of the laws of Rhodes; natural liberty, that of the policy of the Savages; in general, the pleasures of the prince, that of despotic states; that of monarchies, the prince's and the kingdom's glory; the independence of individuals is the end aimed at by the laws of Poland, thence results the oppression of the whole.

One nation there is also in the world that has for the direct end of its constitution political liberty. We shall presently examine the principles on which this liberty is founded; if they are sound, liberty will appear in its highest perfection.

To discover political liberty in a constitution, no great labor is requisite. If we are capable of seeing it where it exists, it is soon found, and we need not go far in search of it.

6.—*Of the Constitution of England*

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Most kingdoms in Europe enjoy a moderate government because the prince who is invested with the two first powers leaves the third to his subjects. In Turkey, where these three powers are united in the Sultan's person, the subjects groan under the most dreadful oppression.

In the republics of Italy, where these three powers are united, there is less liberty than in our monarchies. Hence their government is obliged to have recourse to as violent methods for its support as even that of the Turks; witness the state inquisitors, and the lion's mouth into which every informer may at all hours throw his written accusations.

In what a situation must the poor subject be in those republics! The same body of magistrates are possessed, as executors of the laws, of the whole power they have given themselves in quality of legislators. They may plunder the state by their general determinations; and as they have likewise the judiciary power in their hands, every private citizen may be ruined by their particular decisions.

The whole power is here united in one body; and though there is no

external pomp that indicates a despotic sway, yet the people feel the effects of it every moment.

Hence it is that many of the princes of Europe, whose aim has been levelled at arbitrary power, have constantly set out with uniting in their own persons all the branches of magistracy, and all the great offices of state.

I allow indeed that the mere hereditary aristocracy of the Italian republics does not exactly answer to the despotic power of the Eastern princes. The number of magistrates sometimes moderate the power of the magistracy; the whole body of the nobles do not always concur in the same design; and different tribunals are erected, that temper each other. Thus at Venice the legislative power is in the council, the executive in the *pregadi*, and the judiciary in the *quarantia*. But the mischief is, that these different tribunals are composed of magistrates all belonging to the same body; which constitutes almost one and the same power.

The judiciary power ought not to be given to a standing senate; it should be exercised by persons taken from the body of the people at certain times of the year, and consistently with a form and manner prescribed by law, in order to erect a tribunal that should last only so long as necessity requires.

By this method the judicial power, so terrible to mankind, not being annexed to any particular state or profession, becomes, as it were, invisible. People have not then the judges continually present to their view; they fear the office, but not the magistrate.

In accusations of a deep and criminal nature, it is proper the person accused should have the privilege of choosing, in some measure, his judges, in concurrence with the law; or at least he should have a right to except against so great a number that the remaining part may be deemed his own choice.

The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of that general will.

But though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law. Were they to be the private opinion of the judge, people would then live in society, without exactly knowing the nature of their obligations.

The judges ought likewise to be of the same rank as the accused, or, in other words, his peers; to the end that he may not imagine he is fallen into the hands of persons inclined to treat him with rigor.

If the legislature leaves the executive power in possession of a right to imprison those subjects who can give security for their good behavior, there is an end of liberty; unless they are taken up, in order to answer without delay to a capital crime, in which case they are really free, being subject only to the power of the law.

But should the legislature think itself in danger by some secret con-

spiracy against the state, or by a correspondence with a foreign enemy, it might authorize the executive power, for a short and limited time, to imprison suspected persons, who in that case would lose their liberty only for a while, to preserve it forever.

And this is the only reasonable method that can be substituted to the tyrannical magistracy of the Ephori, and to the state inquisitors of Venice, who are also despotic.

As in a country of liberty, every man who is supposed a free agent ought to be his own governor; the legislative power should reside in the whole body of the people. But since this is impossible in large states, and in small ones is subject to many inconveniences, it is fit the people should transact by their representatives what they cannot transact by themselves.

The inhabitants of a particular town are much better acquainted with its wants and interests than with those of other places; and are better judges of the capacity of their neighbors than of that of the rest of their countrymen. The members, therefore, of the legislature should not be chosen from the general body of the nation; but it is proper that in every considerable place a representative should be elected by the inhabitants.

The great advantage of representatives is, their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy.

It is not at all necessary that the representatives who have received a general instruction from their constituents should wait to be directed on each particular affair, as is practised in the diets of Germany. True it is that by this way of proceeding the speeches of the deputies might with greater propriety be called the voice of the nation; but, on the other hand, this would occasion infinite delays; would give each deputy a power of controlling the assembly; and, on the most urgent and pressing occasions, the wheels of government might be stopped by the caprice of a single person.

When the deputies, as Mr. Sidney well observes, represent a body of people, as in Holland, they ought to be accountable to their constituents; but it is a different thing in England, where they are deputed by boroughs.

All the inhabitants of the several districts ought to have a right of voting at the election of a representative, except such as are in so mean a situation as to be deemed to have no will of their own.

One great fault there was in most of the ancient republics, that the people had a right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no share in the government but for the choosing of representatives, which is within their reach. For though few can tell the exact degree of men's capacities, yet there are none but are capable of knowing in general whether the person they choose is better qualified than most of his neighbors.

Neither ought the representative body to be chosen for the executive part of government, for which it is not so fit; but for the enacting of laws,

or to see whether the laws in being are duly executed, a thing suited to their abilities, and which none indeed but themselves can properly perform.

In such a state there are always persons distinguished by their birth, riches, or honors : but were they to be confounded with the common people, and to have only the weight of a single vote like the rest, the common liberty would be their slavery, and they would have no interest in supporting it, as most of the popular resolutions would be against them. The share they have, therefore, in the legislature ought to be proportioned to their other advantages in the state ; which happens only when they form a body that has a right to check the licentiousness of the people, as the people have a right to oppose any encroachment of theirs.

The legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests.

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It might also happen that a subject intrusted with the administration of public affairs may infringe the rights of the people, and be guilty of crimes which the ordinary magistrates either could not or would not punish. But, in general, the legislative power cannot try causes : and much less can it try this particular case, where it represents the party aggrieved, which is the people. It can only, therefore, impeach. But before what court shall it bring its impeachment ? Must it go and demean itself before the ordinary tribunals, which are its inferiors, and, being composed, moreover, of men who are chosen from the people as well as itself, will naturally be swayed by the authority of so powerful an accuser ? No : in order to preserve the dignity of the people and the security of the subject, the legislative part which represents the people must bring in its charge before the legislative part which represents the nobility, who have neither the same interests nor the same passions.

Here is an advantage which this government has over most of the ancient republics, where this abuse prevailed, that the people were at the same time both judge and accuser.

The executive power, pursuant of what has been already said, ought to have a share in the legislature by the power of rejecting ; otherwise it would soon be stripped of its prerogative. But should the legislative power usurp a share of the executive, the latter would be equally undone.

If the prince were to have a part in the legislature by the power of resolving, liberty would be lost. But as it is necessary he should have a share in the legislature for the support of his own prerogative, this share must consist in the power of rejecting.

The change of government at Rome was owing to this, that neither the senate, who had one part of the executive power, nor the magistrates, who were intrusted with the other, had the right of rejecting, which was entirely lodged in the people.

Here, then, is the fundamental constitution of the government we are treating of. The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative.

These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.

As the executive power has no other part in the legislative than the privilege of rejecting, it can have no share in the public debates. It is not even necessary that it should propose, because as it may always disapprove of the resolutions that shall be taken, it may likewise reject the decisions on those proposals which were made against its will.

In some ancient commonwealths, where public debates were carried on by the people in a body, it was natural for the executive power to propose and debate in conjunction with the people, otherwise their resolutions must have been attended with a strange confusion.

Were the executive power to determine the raising of public money, otherwise than by giving its consent, liberty would be at an end; because it would become legislative in the most important point of legislation.

If the legislative power was to settle the subsidies, not from year to year, but forever, it would run the risk of losing its liberty, because the executive power would be no longer dependent; and when once it was possessed of such a perpetual right, it would be a matter of indifference whether it held it of itself or of another. The same may be said if it should come to a resolution of intrusting, not an annual, but a perpetual command of the fleets and armies to the executive power.

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11. SAMUEL ADAMS—1772

Arguments related to Natural Rights used by John Locke to justify the overthrow of a tyrannical king (James II) in the Glorious Revolution were turned by colonial spokesmen against the English Parliament. The Declaration of Independence of July 4, 1776, was directed against the king, not against the parliament. Much earlier, colonial leaders had taken the position that the American colonies were not bound by the laws of the parliament in England. In 1774, several resolutions were passed in accord with this view, in different colonies. Freeholders of Albermarle County, Virginia, on July 26, 1774, "Resolved, That the inhabitants of the Several States of *British America* are subject to the laws which they adopted at their first settlement, and to such others as have been since made by their respective Legislatures, duly constituted and appointed with their own consent. That no other Legislature whatever can rightly exercise authority over them; and that these privileges they hold as the common rights of mankind, and confirmed by the political constitutions they have respectively assumed, and also by several charters of compact from the Crown." For resolutions of this period, see *Documents of American History* edited by Henry Steele Commager.

Influential in moulding colonial opinion were Samuel Adams, John Adams, and James Otis, of Massachusetts; John Dickinson and James Wilson, of Pennsylvania; and Thomas Jefferson, of Virginia. In Chapter XX of his *Political Philosophies*, Chester C. Maxey says: "In so far as propagandism could do the work, Samuel Adams, more than any other man, was the father of the American Revolution." Another interesting discussion of Samuel Adams can be found in Vernon Louis Parrington's *The Colonial Mind*, Chapter IV.

In the voluminous writings of Samuel Adams will be found numerous references to such well known political writers as Locke, Montesquieu, Hooker, Hume, Grotius, and others. The indebtedness to Locke is clearly seen in the excerpts below from "The Rights of the Colonists" written by Adams, adopted by the Town of Boston, November 20, 1772.¹

1st. Natural Rights of the Colonists as Men.—

Among the Natural Rights of the Colonists are these First. a Right to *Life*; Secondly to *Liberty*; thirdly to *Property*; together with the Right to support and defend them in the best manner they can—Those are evident Branches of, rather than deductions from the Duty of Self Preservation, commonly called the first Law of Nature—

All Men have a Right to remain in a State of Nature as long as they please: And in case of intollerable Oppression, Civil or Religious, to leave the Society they belong to, and enter into another.—

When Men enter into Society, it is by voluntary consent; and they have a right to demand and insist upon the performance of such conditions, And previous limitations as form an equitable *original compact*.—

Every natural Right not expressly given up or from the nature of a Social Compact necessarily ceded remains.—

All positive and civil laws, should conform as far as possible, to the Law of natural reason and equity.—

As neither reason requires, nor religion permits the contrary, every Man living in or out of a state of civil society, has a right peaceably and quietly to worship God according to the dictates of his conscience.—

"Just and true liberty, equal and impartial liberty" in matters spiritual and temporal, is a thing that all Men are clearly entitled to, by the eternal and immutable laws Of God and nature, as well as by the law of Nations, & all well grounded municipal laws, which must have their foundation in the former.—

In regard to Religion, mutual tolleration in the different professions thereof, is what all good and candid minds in all ages have ever practiced; and both by precept and example inculcated on mankind: And it is now generally agreed among christians that this spirit of toleration in the fullest extent consistent with the being of civil society "is the chief characteristical mark of the true church" & In so much that Mr. Lock has asserted, and proved beyond the possibility of contradiction on any solid

¹ From Harry Alonzo Cushing, ed., *The Writings of Samuel Adams*, Vol. II (New York: G. P. Putnam's Sons, 1906); courtesy of G. P. Putnam's Sons,

ground, that such toleration ought to be extended to all whose doctrines are not subversive of society. . . .

The natural liberty of Men by entering into society is abridg'd or restrained so far only as is necessary for the Great end of Society the best good of the whole——

In the state of nature, every man is under God, Judge and sole Judge, of his own rights and the injuries done him: By entering into society, he agrees to an Arbiter or indifferent Judge between him and his neighbours; but he no more renounces his original right, than by taking a cause out of the ordinary course of law, and leaving the decision to Referees or indifferent Arbitrations. In the last case he must pay the Referees for time and troubles; he should be also willing to pay his Just quota for the support of government, the law and constitution; the end of which is to furnish indifferent and impartial Judges in all cases that may happen, whether civil ecclesiastical, marine or military——

“The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man; but only to have the law of nature for his rule.”——

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In short it is the greatest absurdity to suppose it in the power of one or any number of men at the entering into society, to renounce their essential natural rights, or the means of preserving those rights when the great end of civil government from the very nature of its institution is for the support, protection and defence of those very rights: the principal of which as is before observed, are life liberty and property. If men through fear, fraud or mistake, should *in terms* renounce and give up any essential natural right, the eternal law of reason and the great end of society, would absolutely vacate such renunciation; the right to freedom being *the gift* of God Almighty, it is not in the power of Man to alienate this gift, and voluntarily become a slave——

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3d. *The Rights of the Colonists as Subjects*

A Common Wealth or state is a body politick or civil society of men, united together to promote their mutual safety and prosperity, by means of their union.

The *absolute Rights* of Englishmen, and all freemen in or out of Civil society, are principally, *personal security personal liberty and private property*.

All Persons born in the British American Colonies are by the laws of God and nature, and by the Common law of England, *exclusive of all charters from the Crown*, well Entitled, and by the Acts of the British Parliament are declared to be entitled to all the natural essential, inherent & inseparable Rights Liberties and Privileges of Subjects born in Great Britain, or within the Realm. Among those Rights are the following; which

no men or body of men, consistently with their own rights as men and citizens or members of society, can for themselves give up, or take away from others

First, "The first fundamental positive law of all Commonwealths or States, is the establishing the legislative power; as the first fundamental *natural* law also, which is to govern even the legislative power itself, is the preservation of the Society."

Secondly, The Legislative has no right to absolute arbitrary power over the lives and fortunes of the people: Nor can mortals assume a prerogative, not only too high for men, but for Angels; and therefore reserved for the exercise of the *Deity* alone.—

"The Legislative cannot Justly *assume* to itself a power to rule by extempore arbitrary decrees; but it is bound to see that Justice is dispensed, and that the rights of the subjects be decided, by promulgated, standing and known laws, and authorized *independent Judges*;" that is independent as far as possible of Prince or People. "*There shall be one rule of Justice for rich and poor; for the favorite in Court, and the Countryman at the Plough.*"

Thirdly, The supreme power cannot Justly take from any man, any part of his property without his consent, in person or by his Representative.—

These are some of the first principles of natural law & Justice, and the great Barriers of all free states, and of the British Constitution in particular. It is utterly irreconcilable to these principles, and to many other fundamental maxims of the common law, common sense and reason, that a British house of commons, should have a right, at pleasure, to give and grant the property of the Colonists. That these Colonists are well entitled to all the essential rights, liberties and privileges of men and free-men, born in Britain, is manifest, not only from the Colony charter, in general, but acts of the British Parliament. The statute of the 13th of George 2. c. 7. naturalizes even foreigners after seven years residence. The words of the Massachusetts Charter are these, "And further our will and pleasure is, and we do hereby for us, our heirs and successors, grant establish and ordain, that all and every of the subjects of us, our heirs and successors, which shall go to and inhabit within our said province or territory and every of their children which shall happen to be born there, or on the seas in going thither, or returning from thence shall have and enjoy, all liberties and immunities of free and natural subjects within any of the dominions of us, our heirs and successors, to all intents constructions & purposes whatsoever as if they and every of them were born within this our Realm of England." Now what liberty can there be, where property is taken away without consent? Can it be said with any colour of truth and Justice, that this Continent of three thousand miles in length, and of a breadth as yet unexplored, in which however, its supposed, there are five millions of people, has the least voice, vote or influence in the decisions of the British Parliament? Have they, all together, any more right

or power to return a single member to that house of commons, who have not inadvertently, but deliberately assumed a power to dispose of their lives, Liberties and properties, than to choose an Emperor of China! Had the Colonists a right to return members to the british parliament, it would only be hurtfull; as from their local situation and circumstances it is impossible they should be ever truly and properly represented there. The inhabitants of this country in all probability in a few years will be more numerous, than those of Great Britain and Ireland together; yet it is absurdly expected by the promoters of the present measures, that these, with their posterity to all generations, should be easy while their property, shall be disposed of by a house of commons at three thousand miles distant from them; and who cannot be supposed to have the least care or concern for their real interest: Who have not only no natural care for their interest, but must be *in effect* bribed against it; as every burden they lay on the colonists is so much saved or gained to themselves. Hitherto many of the Colonists have been free from Quit Rents; but if the breath of a british house of commons can originate an act for taking away all our money, our lands will go next or be subject to rack rents from haughty and relentless landlords who will ride at ease, while we are trodden in the dirt. The Colonists have been branded with the odious names of traitors and rebels, only for complaining of their grievances; How long such treatment will, or ought to be born is submitted.

12. THOMAS PAINE—1776

Thomas Paine (1737–1809), an Englishman of the Quaker faith, came to America (Pennsylvania) in 1774, following a conversation with Benjamin Franklin. After thirteen years in America, he returned to Europe. He was in England for about two years before going to France where he took part in the French Revolution. In 1802 he returned to America. Seldom has one man been so significant in the political life of three countries and yet spent the last years of his life in poverty and unpopularity. Paine's most outstanding writings were: *Common Sense* (1776), *Crisis* (1776), *The Rights of Man* (1791, 1792), and *The Age of Reason* (1794–1796).

The pamphlet *Common Sense* was published January 10, 1776, about six months before the American Declaration of Independence. It is estimated that about a half million copies were printed. Sir George Otto Traveyan said in *The American Revolution*: "It would be difficult to name any human composition which has had an effect at once so instant, so extended, and so lasting." In writing to Joseph Reed, January 31, 1776, George Washington referred to "the sound doctrine and unanswerable reasoning contained in the pamphlet '*Common Sense*.'" On April 1, 1776, to the same gentleman, George Washington wrote: "My countrymen I know, from their form of government, and steady attachment heretofore to royalty, will come reluctantly into the idea of independence, but time and persecution bring many wonderful things to pass; and by private letters, which I have lately received from Virginia, I find '*Common Sense*' is working a powerful change there in the minds of many men."

It is the important part which Thomas Paine had in changing the minds of the colonists as to loyalty to the king that specially deserves attention here, and is the basis on which the following excerpt was selected. Paine saw, after coming to America, that many colonists who were dissatisfied with British rule did not waver in their loyalty to the British monarch. Attachment to the king was still based upon the belief by many of the colonists in divine right of rulers. After Paine's direct and vigorous attack, in language understood by and attractive to the common man, "the tide turned powerfully against kingship." See *The War of Independence, American Phase*, by Claude H. Van Tyne.

The portions of *Common Sense* printed below are from *The Writings of Thomas Paine*.¹

OF MONARCHY AND HEREDITARY SUCCESSION

Mankind being originally equals in the order of creation, the equality could only be destroyed by some subsequent circumstance: the distinctions of rich and poor may in a great measure be accounted for, and that without having recourse to the harsh ill-sounding names of oppression and avarice. Oppression is often the *consequence*, but seldom or never the *means* of riches; and tho' avarice will preserve a man from being necessarily poor, it generally makes him too timorous to be wealthy.

But there is another and greater distinction for which no truly natural or religious reason can be assigned, and that is the distinction of men into **KINGS** and **SUBJECTS**. Male and female are the distinctions of nature, good and bad the distinctions of Heaven; but how a race of men came into the world so exalted above the rest, and distinguished like some new species, is worth inquiring into, and whether they are the means of happiness or of misery to mankind.

In the early ages of the world, according to the scripture chronology there were no kings; the consequence of which was, there were no wars; it is the pride of kings which throws mankind into confusion. Holland, without a king hath enjoyed more peace for this last century than any of the monarchical governments in Europe. Antiquity favours the same remark; for the quiet and rural lives of the first Patriarchs have a happy something in them, which vanishes when we come to the history of Jewish royalty.

Government by kings was first introduced into the world by the Heathens, from whom the children of Israel copied the custom. It was the most prosperous invention the Devil ever set on foot for the promotion of idolatry. The Heathens paid divine honours to their deceased kings, and the Christian World hath improved on the plan by doing the same to their living ones. How impious is the title of sacred Majesty applied to a worm, who in the midst of his splendor is crumbling into dust!

¹ From Moncure Daniel Conway, ed., *The Writings of Thomas Paine*, Vol. I (New York: G. P. Putnam's Sons, 1894); courtesy of G. P. Putnam's Sons.

As the exalting one man so greatly above the rest cannot be justified on the equal rights of nature, so neither can it be defended on the authority of scripture; for the will of the Almighty as declared by Gideon, and the prophet Samuel, expressly disapproves of government by Kings. All anti-monarchical parts of scripture, have been very smoothly glossed over in monarchical governments, but they undoubtedly merit the attention of countries which have their governments yet to form. *Render unto Cesar the things which are Cesar's*, is the scripture doctrine of courts, yet it is no support of monarchical government, for the Jews at that time were without a king, and in a state of vassalage to the Romans.

Near three thousand years passed away, from the Mosaic account of the creation, till the Jews under a national delusion requested a king. Till then their form of government (except in extraordinary cases where the Almighty interposed) was a kind of Republic, administered by a judge and the elders of the tribes. Kings they had none, and it was held sinful to acknowledge any being under that title but the Lord of Hosts. And when a man seriously reflects on the idolatrous homage which is paid to the persons of kings, he need not wonder that the Almighty, ever jealous of his honour, should disapprove a form of government which so impiously invades the prerogative of Heaven.

Monarchy is ranked in scripture as one of the sins of the Jews, for which a curse in reserve is denounced against them. The history of that transaction is worth attending to.

The children of Israel being oppressed by the Midianites, Gideon marched against them with a small army, and victory thro' the divine interposition decided in his favour. The Jews, elate with success, and attributing it to the generalship of Gideon, proposed making him a king, saying, *Rule thou over us, thou and thy son, and thy son's son*. Here was temptation in its fullest extent; not a kingdom only, but an hereditary one; but Gideon in the piety of his soul replied, *I will not rule over you, neither shall my son rule over you*. THE LORD SHALL RULE OVER YOU. Words need not be more explicit; Gideon doth not decline the honour, but denieth their right to give it; neither doth he compliment them with invented declarations of his thanks, but in the positive stile of a prophet charges them with disaffection to their proper Sovereign, the King of Heaven.

About one hundred and thirty years after this, they fell again into the same error. The hankering which the Jews had for the idolatrous customs of the Heathens, is something exceedingly unaccountable; but so it was, that laying hold of the misconduct of Samuel's two sons, who were intrusted with some secular concerns, they came in an abrupt and clamorous manner to Samuel, saying, *Behold thou art old, and thy sons walk not in thy ways, now make us a king to judge us like all the other nations*. And here we cannot but observe that their motives were bad, viz. that they might be *like* unto other nations, i. e. the Heathens, whereas their true glory lay in being as much *unlike* them as possible. *But the*

thing displeased Samuel when they said, give us a King to judge us; and Samuel prayed unto the Lord, and the Lord said unto Samuel, hearken unto the voice of the people in all that they say unto thee, for they have not rejected thee, but they have rejected me, THAT I SHOULD NOT REIGN OVER THEM. According to all the works which they have done since the day that I brought them up out of Egypt even unto this day, wherewith they have forsaken me, and served other Gods: so do they also unto thee. Now therefore hearken unto their voice, howbeit, protest solemnly unto them and show them the manner of the King that shall reign over them, i.e. not of any particular King, but the general manner of the Kings of the earth whom Israel was so eagerly copying after. And notwithstanding the great distance of time and difference of manners, the character is still in fashion. And Samuel told all the words of the Lord unto the people, that asked of him a King. And he said, This shall be the manner of the King that shall reign over you. He will take your sons and appoint them for himself for his chariots and to be his horsemen, and some shall run before his chariots. (this description agrees with the present mode of impressing men) and he will appoint him captains over thousands and captains over fifties, will set them to ear his ground and to reap his harvest, and to make his instruments of war, and instruments of his chariots. And he will take your daughters to be confectionaries, and to be cooks, and to be bakers (this describes the expense and luxury as well as the oppression of Kings) and he will take your fields and your vineyards, and your olive yards, even the best of them, and give them to his servants. And he will take the tenth of your seed, and of your vineyards, and give them to his officers and to his servants (by which we see that bribery, corruption, and favouritism, are the standing vices of Kings) and he will take the tenth of your men servants, and your maid servants, and your goodliest young men, and your asses, and put them to his work: and he will take the tenth of your sheep, and ye shall be his servants, and ye shall cry out in that day because of your king which ye shall have chosen, AND THE LORD WILL NOT HEAR YOU IN THAT DAY. This accounts for the continuation of Monarchy; neither do the characters of the few good kings which have lived since, either sanctify the title, or blot out the sinfulness of the origin; the high encomium given of David takes no notice of him officially as a King, but only as a Man after God's own heart. Nevertheless the people refused to obey the voice of Samuel, and they said, Nay but we will have a king over us, that we may be like all the nations, and that our king may judge us, and go out before us and fight our battles. Samuel continued to reason with them but to no purpose; he set before them their ingratitude, but all would not avail; and seeing them fully bent on their folly, he cried out, I will call unto the Lord, and he shall send thunder and rain (which was then a punishment, being in the time of wheat harvest) that ye may perceive and see that your wickedness is great which ye have done in the sight of the Lord, IN ASKING YOU A KING. So Samuel called unto the Lord, and the Lord sent thunder and

rain that day, and all the people greatly feared the Lord and Samuel. And all the people said unto Samuel; Pray for thy servants unto the Lord thy God that we die not, for WE HAVE ADDED UNTO OUR SINS THIS EVIL, TO ASK A KING. These portions of scripture are direct and positive. They admit of no equivocal construction. That the Almighty hath here entered his protest against monarchical government is true, or the scripture is false. And a man hath good reason to believe that there is as much of kingcraft as priestcraft in withholding the scripture from the public in popish countries. For monarchy in every instance is the popery of government.

To the evil of monarchy we have added that of hereditary succession; and as the first is a degradation and lessening of ourselves, so the second, claimed as a matter of right, is an insult and imposition on posterity. For all men being originally equals, no one by birth could have a right to set up his own family in perpetual preference to all others for ever, and tho' himself might deserve some decent degree of honours of his cotemporaries, yet his descendants might be far too unworthy to inherit them. One of the strongest natural proofs of the folly of hereditary right in Kings, is that nature disapproves it, otherwise she would not so frequently turn it into ridicule, by giving mankind an *Ass for a Lion*.

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England since the conquest hath known some few good monarchs, but groaned beneath a much larger number of bad ones: yet no man in his senses can say that their claim under William the Conqueror is a very honourable one. A French bastard landing with an armed Banditti and establishing himself king of England against the consent of the natives, is in plain terms a very paltry rascally original. It certainly hath no divinity in it. However it is needless to spend much time in exposing the folly of hereditary right; if there are any so weak as to believe it, let them promiscuously worship the Ass and the Lion, and welcome. I shall neither copy their humility, nor disturb their devotion.

Yet I should be glad to ask how they suppose kings came at first? The question admits but of three answers, viz. either by lot, by election, or by usurpation. If the first king was taken by lot, it establishes a precedent for the next, which excludes hereditary succession. Saul was by lot, yet the succession was not hereditary, neither does it appear from that transaction that there was any intention it ever should. If the first king of any country was by election, that likewise establishes a precedent for the next; for to say, that the right of all future generations is taken away, by the act of the first electors, in their choice not only of a king but of a family of kings for ever, hath no parallel in or out of scripture but the doctrine of original sin, which supposes the free will of all men lost in Adam; and from such comparison, and it will admit of no other, hereditary succession can derive no glory. For as in Adam all sinned, and as in the first electors all men obeyed; as in the one all mankind were subjected to

Satan, and in the other to sovereignty; as our innocence was lost in the first, and our authority in the last; and as both disable us from re-assuming some former state and privilege, it unanswerably follows that original sin and hereditary succession are parallels. Dishonourable rank! inglorious connection! yet the most subtle sophist cannot produce a juster simile.

As to usurpation, no man will be so hardy as to defend it; and that William the Conqueror was an usurper is a fact not to be contradicted. The plain truth is, that the antiquity of English monarchy will not bear looking into.

But it is not so much the absurdity as the evil of hereditary succession which concerns mankind. Did it ensure a race of good and wise men it would have the seal of divine authority, but as it opens a door to the *foolish*, the *wicked*, and the *improper*, it hath in it the nature of oppression. Men who look upon themselves born to reign, and others to obey, soon grow insolent. Selected from the rest of mankind, their minds are early poisoned by importance; and the world they act in differs so materially from the world at large, that they have but little opportunity of knowing its true interests, and when they succeed to the government are frequently the most ignorant and unfit of any throughout the dominions.

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In short, monarchy and succession have laid (not this or that kingdom only) but the world in blood and ashes. 'Tis a form of government which the word of God bears testimony against, and blood will attend it.

If we enquire into the business of a King, we shall find that in some countries they may have none; and after sauntering away their lives without pleasure to themselves or advantage to the nation, withdraw from the scene, and leave their successors to tread the same idle round. In absolute monarchies the whole weight of business civil and military lies on the King; the children of Israel in their request for a king urged this plea, "that he may judge us, and go out before us and fight our battles." But in countries where he is neither a Judge nor a General, as in England, a man would be puzzled to know what *is* his business.

The nearer any government approaches to a Republic, the less business there is for a King. It is somewhat difficult to find a proper name for the government of England. Sir William Meredith calls it a Republic; but in its present state it is unworthy of the name, because the corrupt influence of the Crown, by having all the places in its disposal, hath so effectually swallowed up the power, and eaten out the virtue of the House of Commons (the Republican part in the constitution) that the government of England is nearly as monarchical as that of France or Spain. Men fall out with names without understanding them. For 'tis the Republican and not the Monarchical part of the constitution of England which Englishmen glory in, viz. the liberty of choosing an House of Commons from out of their own body—and it is easy to see that when Republican virtues fails, slavery ensues. Why is the constitution of England sickly, but because

monarchy hath poisoned the Republic; the Crown hath engrossed the Commons.

In England a King hath little more to do than to make war and give away places; which, in plain terms, is to impoverish the nation and set it together by the ears. A pretty business indeed for a man to be allowed eight hundred thousand sterling a year for, and worshipped, into the bargain! Of more worth is one honest man to society, and in the sight of God, than all the crowned ruffians that ever lived.

IV

Independence, Confederation, and Making the Constitution



13. THE DECLARATION OF INDEPENDENCE—1776
14. ARTICLES OF CONFEDERATION—1781
15. THE VIRGINIA OR RANDOLPH PLAN—1787
16. THE PATERSON OR NEW JERSEY PLAN—1787
17. HAMILTON'S PLAN OF UNION—1787

II
IN the period from 1775 to 1789, with a background of growing political institutions reflected in documents like *Magna Carta* (1215) and the *Bill of Rights* (1689), and with the inspiration of influential political writers like John Locke and Thomas Paine, Americans struggled with ideas, forces, and institutions in such a way as to work out a system of government which was the result of many compromises. The Constitution of 1789, the product of such compromises, provided a framework far more satisfactory than the one under the Articles of Confederation, but left some important questions unanswered.

INDEPENDENCE, CONFEDERATION, AND MAKING THE CONSTITUTION



13. THE DECLARATION OF INDEPENDENCE—1776

"The job that Tom Paine had begun in *Common Sense* Jefferson intended to finish in the Declaration of Independence." Such is the view expressed by John C. Miller in his *Origins of the American Revolution*. Though a Resolution of Independence had been approved by the Continental Congress on July 2, 1776, it is the Declaration of Independence of July 4, 1776, which is considered the formal justification of the separation from England. The committee appointed to draft the Declaration was composed of Thomas Jefferson, John Adams, Benjamin Franklin, Robert R. Livingston, and Roger Sherman. Jefferson made the first draft, and was the principal author of the Declaration. As is evident from the document, he realized that it was the tie with the king that remained to be broken in the minds of many Americans.

Locke's influence on the document is apparent. For a good discussion, see Carl Becker, *The Declaration of Independence*. Jefferson's own account of the making of the Declaration may be seen in Volume 1 of *The Writings of Thomas Jefferson*, Andrew A. Lipscomb, editor-in-chief. The text used below is taken from *Revised Statutes of the United States*, Second Edition (Washington: Government Printing Office, 1878).

THE DECLARATION OF INDEPENDENCE—1776

In Congress, July 4, 1776.

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to

secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended Legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government:

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our Brittish brethren. We

have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.

New Hampshire.

JOSIAH BARTLETT,
Wm. WHIPPLE,

MATTHEW THORNTON.

Massachusetts Bay.

SAML. ADAMS,
JOHN ADAMS,

ROBT. TREAT PAINE,
ELBRIDGE GERRY.

Rhode Island.

STEP. HOPKINS,

WILLIAM ELLERY.

Connecticut.

ROGER SHERMAN,
SAM'EL HUNTINGTON,

Wm. WILLIAMS,
OLIVER WOLCOTT.

New York.

WM. FLOYD,
PHIL. LIVINGSTON,

FRANS. LEWIS,
LEWIS MORRIS.

New Jersey.

RICH'D. STOCKTON,
JNO. WITHERSPOON,
FRAS. HOPKINSON,

JOHN HART,
ABRA. CLARK.

Pennsylvania.

ROBT. MORRIS,
BENJAMIN RUSH,
BENJA. FRANKLIN,
JOHN MORTON,
GEO. CLYMER,

JAS. SMITH,
GEO. TAYLOR,
JAMES WILSON,
GEO. ROSS.

Delaware.

CAESAR RODNEY,
GEO. READ,

THO. M'KEAN.

Maryland.

SAMUEL CHASE,
Wm. PACA,
THOS. STONE,

CHARLES CARROLL
of Carrollton.

Virginia.

GEORGE WYTHE,
RICHARD HENRY LEE,
TH. JEFFERSON,
BENJA. HARRISON,

THOS. NELSON, jr.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

North Carolina.

Wm. HOOPER,
JOSEPH HEWES,

JOHN PENN.

South Carolina.

EDWARD RUTLEDGE,
THOS. HEYWARD, Junr.,

THOMAS LYNCH, Junr.,
ARTHUR MIDDLETON.

Georgia.

BUTTON GWINNETT,
LYMAN HALL,

GEO. WALTON.

14. ARTICLES OF CONFEDERATION—1781

The Second Continental Congress, which had assembled in May, 1775, found it necessary to assume authority in order to direct action against the British government. The government under the Second Continental Congress, the first government of the United States of America, has been called a "benevolent tyranny." In order to set up a stable, authorized government, delegates to the Second Continental Congress drafted the Articles of Confederation and submitted them to the several states in 1777. John Dickinson, of Pennsylvania, was chairman of the committee appointed by the congress to draft the Articles. This committee had the benefit of discussions and plans which had been before the colonial leaders in preceding years, such as The Albany Plan of Union which had been worked out by Benjamin Franklin in 1754.

In March, 1781, after all thirteen states had ratified the Articles of Confederation, the second government of the United States of America, the government under these Articles, began to function. This government lasted until 1789, when the third government, the

one provided for in the Constitution drafted at Philadelphia, took over responsibilities under the federal organization.

In reading the Articles of Confederation, students will notice certain provisions which formed the basis for sections of the Constitution of 1789. It will be interesting to compare the Articles not only with the Constitution of 1789 but also with earlier documents such as the Articles of Confederation of the United Colonies of New England (1643). The text below is taken from the *Revised Statutes of the United States*, Second Edition (Washington: Government Printing Office, 1878).

ARTICLES OF CONFEDERATION—1777.

To all to whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting.

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of our Lord One Thousand Seven Hundred and Seventyseven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia in the Words following, viz. "*Articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.*"

ARTICLE I. The stile of this confederacy shall be "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to

prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted: nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have

the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceed-

ings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States.—fixing the standard of weights and measures throughout the United States.—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing all officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to

the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secresy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise

of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the States we re[s]pectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the State of Pennsylvania the ninth day of July in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the independence of America.

15. THE VIRGINIA OR RANDOLPH PLAN—1787

In May, 1787, delegates assembled in Philadelphia to attend the convention at which the Constitution was drafted. Delegations from five states, making up the Annapolis Convention, in 1786, had proposed the meeting at Philadelphia. Among the plans presented at Philadelphia were: (15) the Virginia or Randolph Plan, sometimes called the Large State Plan, drafted by the Virginia delegates under the guiding influence of James Madison, presented to the convention

by Edmund Randolph; (16) the Paterson or New Jersey Plan, presented on behalf of the small states, as a substitute for the Virginia Plan, by William Paterson of New Jersey (whose name is spelled *Patterson* in the excerpt below); and (17) Hamilton's Plan. The careful student will see very significant relationship between provisions of the Constitution as finally drafted and some of the proposals that were included in the Virginia and the New Jersey Plans, respectively. The plan suggested by Alexander Hamilton, of New York, did not receive very serious consideration.

Interested students will find useful books like: Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 together with the Journal of the Federal Convention*; Max Farrand, ed., *The Records of the Federal Convention of 1787*; Andrew C. McLaughlin, *The Confederation and the Constitution*; Arthur T. Prescott, *Drafting the Federal Constitution*; and Charles Warren, *The Making of the Constitution*.

The texts of the three plans printed below are taken from Volume 2 of Henry D. Gilpin, ed., *The Papers of James Madison* (Mobile: Allston Mygatt, 1842).

MR. RANDOLPH then opened the main business:—

He expressed his regret, that it should fall to him, rather than those who were of longer standing in life and political experience, to open the great subject of their mission. But as the Convention had originated from Virginia, and his colleagues supposed that some proposition was expected from them, they had imposed this task on him.

He then commented on the difficulty of the crisis, and the necessity of preventing the fulfilment of the prophecies of the American downfall.

He observed, that, in revising the federal system we ought to inquire, first, into the properties which such a government ought to possess; secondly, the defects of the Confederation; thirdly, the danger of our situation; and fourthly, the remedy.

1. The character of such a government ought to secure, first, against foreign invasion; secondly, against dissensions between members of the Union, or seditions in particular States; thirdly, to procure to the several States various blessings of which an isolated situation was incapable; fourthly, it should be able to defend itself against encroachment; and fifthly, to be paramount to the State Constitutions.

2. In speaking of the defects of the Confederation, he professed a high respect for its authors, and considered them as having done all that patriots could do, in the then infancy of the science of constitutions, and of confederacies; when the inefficiency of requisitions was unknown,—no commercial discord had arisen among any States,—no rebellion had appeared, as in Massachusetts,—foreign debts had not become urgent,—the havoc of paper-money had not been foreseen,—treaties had not been violated,—and perhaps nothing better could be obtained, from the jealousy of the States with regard to their sovereignty.

He then proceeded to enumerate the defects:—First, that the Confederation produced no security against foreign invasion; Congress not

being permitted to prevent a war, nor to support it by their own authority. Of this he cited many examples ; most of which tended to show, that they could not cause infractions of treaties, or of the law of nations, to be punished ; that particular States might by their conduct provoke war without control ; and that, neither militia nor drafts being fit for defence on such occasions, enlistments only could be successful, and these could not be executed without money.

Secondly, that the Federal Government could not check the quarrel between States, nor a rebellion in any, not having constitutional power nor means to interpose according to the exigency.

Thirdly, that there were many advantages which the United States might acquire, which were not attainable under the Confederation,—such as a productive impost,—counteraction of the commercial regulations of other nations,—pushing of commerce *ad libitum*, &c. &c.

Fourthly, that the Federal Government could not defend itself against encroachments from the States.

Fifthly, that it was not even paramount to the State Constitutions, ratified as it was in many of the States.

3. He next reviewed the danger of our situation ; and appealed to the sense of the best friends of the United States,—to the prospect of anarchy from the laxity of government everywhere,—and to other considerations.

4. He then proceeded to the remedy ; the basis of which he said must be the republican principle.

He proposed, as conformable to his ideas, the following resolutions, which he explained one by one.

1. “Resolved, that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution ; namely, ‘common defence, security of liberty, and general welfare.’

2. “Resolved, therefore, that the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. “Resolved, that the National Legislature ought to consist of two branches.

4. “Resolved, that the members of the first branch of the National Legislature ought to be elected by the people of the several States every _____ for the term of _____ ; to be of the age of _____ years at least ; to receive liberal stipends by which they may be compensated for the devotion of their time to the public service ; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of _____ after its expiration ; to be incapable of re-election for the space of _____ after the expiration of their term of service, and to be subject to recall.

5. "Resolved, that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures, to be of the age of _____ years at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service; and for the space of _____ after the expiration thereof.

6. "Resolved, that each branch ought to possess the right of originating acts; that the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfil its duty under the Articles thereof.

7. "Resolved, that a National Executive be instituted; to be chosen by the National Legislature for the term of _____; to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase nor diminution shall be made, so as to affect the magistracy existing at the time of increase or diminution; and to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation.

8. "Resolved, that the Executive, and a convenient number of the national Judiciary, ought to compose a Council of Revision, with authority to examine every act of the National Legislature, before it shall operate, and every act of a particular Legislature before a negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular Legislature be again negatived by _____ of the members of each branch.

9. "Resolved, that a National Judiciary be established: to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature; to hold their offices during good behaviour, and to receive, punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of

other States, applying to such jurisdictions, may be interested; or which respect the collection of the national revenue; impeachments of any national officers, and questions which may involve the national peace and harmony.

10. "Resolved, that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

11. "Resolved, that a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State.

12. "Resolved, that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the Articles of Union shall be adopted, and for the completion of all their engagements.

13. "Resolved, that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.

14. "Resolved, that the legislative, executive, and judiciary powers, within the several States, ought to be bound by oath to support the Articles of Union.

15. "Resolved, that the amendments which shall be offered to the Confederation, by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures, to be expressly chosen by the people to consider and decide thereon."

He concluded with an exhortation, not to suffer the present opportunity of establishing general peace, harmony, happiness, and liberty in the United States to pass away unimproved.

It was then resolved, that the House will to-morrow resolve itself into a Committee of the Whole House, to consider of the state of the American Union; and that the propositions moved by MR. RANDOLPH be referred to the said Committee.

16. THE PATERSON OR NEW JERSEY PLAN—1787

FRIDAY, JUNE 15TH.

In Convention.—MR. PATERSON laid before the Convention the plan which he said several of the Deputations wished to be substituted in place of that proposed by Mr. RANDOLPH. After some little discussion of the most proper mode of giving it a fair deliberation, it was agreed, that it should be referred to a Committee of the Whole; and that, in order to place the two plans in due comparison, the other should be recommitted. At the earnest request of Mr. LANSING and some other gentlemen, it

was also agreed that the Convention should not go into Committee of the Whole on the subject till to-morrow; by which delay the friends of the plan proposed by Mr. PATERSON would be better prepared to explain and support it, and all would have an opportunity of taking copies.

The propositions from New Jersey, moved by Mr. PATERSON, were in the words following:

1. Resolved, that the Articles of Confederation ought to be so revised, corrected, and enlarged, as to render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union.

2. Resolved, that, in addition to the powers vested in the United States in Congress, by the present existing Articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandises of foreign growth or manufacture, imported into any part of the United States; by stamps on paper, vellum or parchment; and by a postage on all letters or packages passing through the general post-office; to be applied to such Federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same, from time to time, to alter and amend in such manner as they shall think proper; to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other; provided that all punishments, fines, forfeitures and penalties, to be incurred for contravening such acts, rules, and regulations, shall be adjudged by the common law Judiciaries of the State in which any offence contrary to the true intent and meaning of such acts, rules, and regulations, shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the Superior common law Judiciary in such State; subject, nevertheless, for the correction of all errors, both in law and fact, in rendering judgment, to an appeal to the Judiciary of the United States.

3. Resolved, that whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the Articles of Confederation, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that, if such requisitions be not complied with, in the time specified therein, to direct the collection thereof in the non-complying States; and for that purpose to devise and pass acts directing and authorizing the same; provided, that none of the powers hereby vested in the United States in Congress, shall be exercised without the consent of at least _____ States; and in that proportion, if the number of confederated States should hereafter be increased or diminished.

4. Resolved, that the United States in Congress be authorized to elect a Federal Executive, to consist of _____ persons, to continue in office for the term of _____ years; to receive punctually, at stated times, a

fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution; to be paid out of the Federal treasury; to be incapable of holding any other office or appointment during their time of service, and for _____ years thereafter: to be ineligible a second time, and removable by Congress, on application by a majority of the Executives of the several States; that the Executive, besides their general authority to execute the Federal acts, ought to appoint all Federal officers not otherwise provided for, and to direct all military operations; provided that none of the persons composing the Federal Executive shall, on any occasion, take command of any troops, so as personally to conduct any military enterprise, as General, or in any other capacity.

5. Resolved, that a Federal Judiciary be established, to consist of a supreme tribunal, the Judges of which to be appointed by the Executive, and to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the Judiciary so established shall have authority to hear and determine, in the first instance, on all impeachments of Federal officers; and, by way of appeal, in the dernier resort, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the Federal revenue; that none of the Judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for _____ thereafter.

6. Resolved, that all acts of the United States in Congress, made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, so far forth as those acts or treaties shall relate to the said States or their citizens; and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individuals States to the contrary notwithstanding: and that if any State, or any body of men in any State, shall oppose or prevent the carrying into execution such acts or treaties, the Federal Executive shall be authorized to call forth the power of the confederated States, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

7. Resolved, that provision be made for the admission of new States into the Union.

8. Resolved, that the rule for naturalization ought to be the same in every State.

9. Resolved, that a citizen of one State committing an offence in an-

other State of the Union, shall be deemed guilty of the same offence as if it had been committed by a citizen of the State in which the offence was committed.

Adjourned.

17. HAMILTON'S PLAN OF UNION—1787

[Presented Monday, June 18th]

"I. The supreme Legislative power of the United States of America to be vested in two different bodies of men; the one to be called the Assembly, the other the Senate; who together shall form the Legislature of the United States, with power to pass all laws whatsoever, subject to the negative hereafter mentioned.

"II. The Assembly to consist of persons elected by the people to serve for three years.

"III. The Senate to consist of persons elected to serve during good behaviour; their election to be made by electors chosen for that purpose by the people. In order to this, the States to be divided into election districts. On the death, removal, or resignation of any Senator, his place to be filled out of the district from which he came.

"IV. The supreme Executive authority of the United States to be vested in a Governor, to be elected to serve during good behaviour; the election to be made by Electors chosen by the people in the Election Districts aforesaid. The authorities and functions of the Executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed; to have the direction of war when authorized or begun; to have, with the advice and approbation of the Senate, the power of making all treaties; to have the sole appointment of the heads or chief officers of the Departments of Finance, War, and Foreign Affairs; to have the nomination of all other officers, (ambassadors to foreign nations included,) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except treason, which he shall not pardon without the approbation of the Senate.

"V. On the death, resignation, or removal of the Governor, his authorities to be exercised by the President of the Senate till a successor be appointed.

"VI. The Senate to have the sole power of declaring war; the power of advising and approving all treaties; the power of approving or rejecting all appointments of officers, except the heads or chiefs of the Departments of Finance, War, and Foreign Affairs.

"VII. The supreme Judicial authority to be vested in Judges, to hold their offices during good behaviour, with adequate and permanent salaries. This court to have original jurisdiction in all causes of capture, and an appellate jurisdiction in all causes in which the revenues of the General Government, or the citizens of foreign nations, are concerned.

"VIII. The Legislature of the United States to have power to institute courts in each State for the determination of all matters of general concern.

"IX. The Governor, Senators, and all officers of the United States, to be liable to impeachment for mal-, and corrupt conduct; and upon conviction to be removed from office, and disqualified for holding any place of trust or profit; all impeachments to be tried by a Court to consist of the Chief _____, or Judge of the Superior Court of Law of each State, provided such Judge shall hold his place during good behaviour and have a permanent salary.

"X. All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governor or President of each State shall be appointed by the General Government, and shall have a negative upon the laws about to be passed in the State of which he is the Governor or President.

"XI. No State to have any forces, land or naval; and the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them."

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V

Changing and Enlarging the Constitution



18. THE CONSTITUENT POWER AND FORMAL
AMENDMENT

Friedrich, *The New Belief in the Common Man*

19. STATUTORY OR LEGISLATIVE ENACTMENT
Judicial Code

20. JUDICIAL DECISION

*Pensacola Telegraph Company v. Western Union
Telegraph Company*

21. EXECUTIVE OR ADMINISTRATIVE ORDER
Federal Register

SINCE the Constitution of the United States of America was adopted in 1789, "its development has proceeded in an ever-widening stream," as has been pointed out by Carl Brent Swisher in his *American Constitutional Development* and his recent book on *The Growth of Constitutional Power in the United States*.

The Constitution may be changed, supplemented, or enlarged by (a) exercise of the constituent power, (b) any one of four formal methods of amendment (Art. V), (c) statutory or legislative enactment, (d) judicial interpretation, (e) executive or administrative order, (f) usage or custom, and (g) treaty. The four readings which follow give some attention to methods a, b, c, d, and e. Change or enlargement of the Constitution by usage or custom may be seen in the development of the President's cabinet or in the ways in which political parties exercise extra-legal controls over important operations of the federal government. Enlargement by treaty may be seen in the case of *State of Missouri, Appt. v. Ray P. Holland, United States Game Warden*, 252 U. S. 416 (1920). In this case the Supreme Court upheld a treaty (between Great Britain and the United States) and a statute carrying out the treaty despite the fact that it had been claimed that the treaty and the statute were "void as an interference with the rights reserved to the states."

CHANGING AND ENLARGING THE CONSTITUTION



18. THE CONSTITUENT POWER AND FORMAL AMENDMENT

Americans seem to forget at times the significance of the Constituent Power, the fundamental basis of their government, and also the importance of the representative body through which that power may be exercised, the Constitutional Convention. The reading below enables the student to distinguish clearly between the Constituent Power and the Amending Power, a distinction which many writers on American government have neglected. The four methods of formal amendment will be found in Article V of the Constitution.

Carl J. Friedrich, a citizen of the United States, was born in Leipzig in 1901. He came to America in 1922. Since receiving his doctor's degree from the University of Heidelberg in 1925, he has served as a faculty member at Harvard University, where he became Professor of Government in 1936. Dr. Friedrich has made valuable contributions to American life, as author, editor, lecturer, and member of special councils. Two of his recent books are: *Constitutional Government and Democracy* and *The New Belief in the Common Man* (1942). The latter volume is the source of the following selection.¹

THE CONSTITUENT POWER

The constituent power—that is to say, the residuary power of the people “to reform, alter, or abolish” the government—stems from the great constitutional struggle which rent England during the seventeenth century. The idea has medieval roots, and it was persuasively stated by John Locke after the Glorious Revolution. It was repeatedly and flatly set forth by the makers of the American constitution, more especially James Wilson, Sam Adams, and George Mason. The term “constituent power” was central in the political thought of John Quincy Adams. All this is very well known. But it is equally true that throughout this body of thinking there is a lack of precision when it comes to explaining just what this constituent power consists of. When these writers speak of “the people,” whom do they mean? A majority of one? Since the decision concerning the form of government is certainly a grave and important one,

¹ Used by permission of the author.

we may suspect that they do not. We cannot escape from this issue by constitutional provisions for an amending power. No matter how elaborate the provisions for an amending power may be, they must never, from a political viewpoint, be assumed to have superseded the constituent power, for the constituent power is the power that made the constitution. It remains forever in the people, who cannot be bound by their ancestors to any existing governmental pattern. It is the power to make a revolution. We say "power" deliberately, rather than "right." For it is a purely factual, norm-creating thing, this power to establish a constitution or a pattern of government. What more can be said about it?

The constituent power is exercised by the constituent group. The constituent group can come into operation only when the government fails to function constitutionally, i. e., becomes arbitrary and tyrannical. Its function results from the residuary and unorganized power of resistance in the community. The constituent group is neither a class nor any other established sector of the community; it forms spontaneously in response to the need of the revolutionary situation. The more intelligent and vital members of the community are apt to take things into their own hands when the situation becomes unbearable, for these men have a natural desire for freedom. Arbitrary power will not long be endured by them. But the traditional doctrine of the seventeenth and eighteenth centuries, the doctrine as we find it in Locke as well as in revolutionary America, has two important defects—defects which have tended to discredit it in its entirety. These two defects are (1) that the doctrine failed to make it explicit that the constituent group as defined can come into play *only* against arbitrary power, but not against a functioning constitutionalism and (2) that the doctrine fails to emphasize the specific function of the constituent group, namely, to build a constitution.

The two defects are clearly corollaries, for there is not likely to be any widespread demand for a new constitution so long as the existing constitution functions effectively. Under such conditions, the demand for a new constitution would not receive sufficient support, nor could the building of such a constitution count upon general approval. And yet there is a difficulty in that there may be widespread disagreement as to whether an existing constitutionalism is functioning satisfactorily. The millions of unemployed are likely to take a view of present-day constitutionalism in America different from that of more successful groups in the community. In the last analysis, the community itself is the judge, according to the doctrine of the constituent power.

Before the advent of the New Deal, disagreement became so sharp that a revolutionary situation threatened. But no constituent group did arise in America in the thirties, although the more conservative members of the Supreme Court did their level best to convince the community that the existing constitutionalism no longer functioned, but served merely as a screen for the arbitrary exercise of power. The policies of the Roosevelt administration convinced the people, however, that there were as yet

vast resources within the existing framework of government, and the revolutionary impulse subsided. Far from being the dictator that his opponents accused him of being, Roosevelt was, in fact, the savior of constitutionalism. He proved that it still was a functioning system in this country. The common man's judgment was definitely that American constitutionalism was not tyrannical and arbitrary. This is most important, because democratic constitutionalism is forever directed against the establishment of such arbitrary power; conversely, only the general conviction that such arbitrary power has arisen calls forth a constituent group and revolutionary action.

REVOLUTIONARY ACTION—WHEN CONSTITUENT?

But if such a group forms and revolutionary action takes place, it is constituent only if the group undertakes to set up a new constitution.

The fact that the constituent group possesses its power for the purpose of setting up a new constitution makes it inadmissible to call this group the sovereign, unless it be clearly understood that the word "sovereignty" is ordinarily used in an entirely different connotation. . . . No useful purpose is served by smuggling the sovereign back through another door in this fashion. A constitutional democracy has no sovereign, but it does recognize a constituent power, a residuary power of the community behind and beyond all government capable of destroying the existing constitution and establishing a new one.

This recognition of the ultimate popular sanction of the constitution itself depends once again upon the belief in the common man. This belief at the same time clearly implies the recognition of the constituent power. . . . Andrew Jackson was frequently seen, by those whose interests he attacked, as another "dictator," and cartoons depicted him as an emperor with crown and purple much in the fashion of our own day's abuse of Roosevelt. The obvious and all-important distinction is, of course, that Napoleon and his present-day imitators not only *destroyed one* constitution, but *failed to build another*. No constituent power was exercised by any constituent group in Germany when Hitler became dictator. It was an anti-constitutional reaction. The same holds true of the two Napoleons.

The frightened "liberals" who turned against the common man because of these developments failed fully to appreciate that these reactionary movements were financed and led by threatened privilege and special "elites." The way to counter these corruptions of democratic constitutionalism is not to abandon the belief in the common man, but to set forth more realistically the actual nature and functioning of the common man, and hence of the constituent power. More especially must we never lose sight of the fact that this power is the outcome of the common man's desire for freedom, that is to say, for having a functioning constitution, free from arbitrary violence and tyranny.

CONSTITUTIONAL MAJORITIES—WHAT?

Let us accept, then, the proposition that qualified majorities are in keeping with the basic principle of majority rule, indeed that such qualifications frequently are the direct outgrowth of the majority principle itself. The only question that remains is: How shall they be qualified? It seems to many that our own amending process is too cumbrous. I share this view. I believe that the greatest service a political party could render to political improvement in this country would be to amend the amending clause so as to provide for a cheaper and swifter process. Certainly Switzerland has prospered under a much simpler plan; the same is true of many of our state constitutions. The danger of such arrangements is that a good deal of ordinary legislation is in course of time written into the constitution. This is, however, much less likely to be the case in the federal sphere, where a constitutional amendment will always necessitate a large outlay of funds.

It is, by definition, impossible to lay down rules as to the majorities required for revolutionary alterations of a constitution. It is apparent from what has been said, however, that the majorities required would probably be sizable, at least in the initial stages. The problem is largely of an academic nature, since it is both the hope and the experience of working constitutional systems to obliterate the need for such upheavals by yielding to the demand for changes, no matter how basic. There is, for example, little question that the government of the United States has developed into what some like to refer to as a "service state," others as a "welfare state," still others as "socialism." What all these words seek to indicate is the undeniable growth of numerous regulatory and service functions which the American government did not exercise a hundred years ago. There is, furthermore, reason to believe that the American government will continue to develop in whatever directions seem desirable to the people at large. Insofar as these developments are successful adaptations to a changed economic environment, they vindicate our belief in the common man. All these constitutional changes have, in the last analysis, been his work.

What we so easily forget when we chafe under the restraints which hinder us in doing the to us obviously right thing is that in a democracy we are committed to carrying the rest of the community with us. Nothing, in other words, is intrinsically right unless and until it is approved by suitable majorities. As was pointed out before, this does not mean that what majorities approve is therefore right—far from it. Majorities of common men are not infallible, any more than are the common men who compose them. They themselves are the first to realize that safeguards are needed. If such safeguards bring it to pass that self-interested minorities can entrench themselves and thwart the realization of the majority's interest for any length of time, then steps can and will be taken to smoke out such self-interested minorities.

But the protection of minorities as such cannot be surrendered as a principle simply because of such possibilities. In my opinion, the workers have least reason to espouse the doctrine of the extreme majoritarians. This needs to be stated quite emphatically, since quite a few men who consider themselves the special friends of the workers have enunciated such extreme views. . . .

19. STATUTORY OR LEGISLATIVE ENACTMENT

The Constitution drafted at Philadelphia and the formal amendments thereto constitute the supreme law of the land. However, that document does not include detailed provisions for all the machinery necessary for carrying on the government. Article III of the Constitution vests judicial power in "one supreme court and in such inferior courts as the Congress may from time to time ordain and establish." To establish inferior courts and other governmental machinery, Congress has passed many statutes which supplement or enlarge the provisions of the Constitution. To illustrate: the federal District Courts and the Circuit Courts of Appeals depend upon legislative enactment as do the means for making use of the writ of habeas corpus. Not only for the theory and for some of the specific provisions of the Constitution are Americans indebted to English ancestors, but even in the details of statutory enactment an indebtedness is apparent. Compare, for instance, section 456 of the excerpt below with the time of return provided for in the Habeas Corpus Act passed in England in 1679 (reading no. 41, *infra*). See also no. 42, *infra*.

The text of the following sections is taken from *United States Code, 1940 Edition* (Washington: Government Printing Office, 1941), Title 28, Judicial Code and Judiciary.

Section 1. District courts; judges; appointments and residence.—In each of the districts described in chapter five of this title there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge, except that in the District of Arizona, . . . [and such other additional district judges as have been or may be provided for by law]. . . .

6. Clerks of certain courts; appointment.—Except in cases otherwise provided for by law, a clerk shall be appointed for each United States district court including Hawaii and Puerto Rico by the judge for the district, or the senior judge if there be more than one judge in the district. . . .

Section 451. Power of courts.—The Supreme Court and the district courts shall have power to issue writs of habeas corpus. . . .

452. Power of judges.—The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant

writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. . . .

453. When prisoner is in jail.—The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify. . . .

454. Application for; complaint in writing.—Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application. . . .

455. Allowance and direction.—The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained. . . .

456. Time of return.—Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days. . . .

457. Form of return.—The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party. . . .

458. Body to be produced.—The person making the return shall at the same time bring the body of the party before the judge who granted the writ. . . .

459. Day for hearing.—When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time. . . .

460. Denial of return; counter allegations; amendments.—The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return

and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained. . . .

461. Summary hearing; disposition of party.—The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. . . .

20. JUDICIAL DECISION

Decisions handed down by our courts, particularly by the Supreme Court of the United States, constitute another important way in which the Constitution of 1789 has been enlarged or supplemented. The character of American political life can not be understood without an appreciation of the effect of judicial review upon our Constitution. "The institution of judicial review . . . resembles less the constitutional laws and practices of other states than do the systems of checks and balances, of federalism, . . . , all of which have sometimes been spoken of as uniquely American," says Benjamin F. Wright in *The Growth of American Constitutional Law*. The importance of judicial decisions will be apparent from subsequent readings in this volume such as those dealing with powers of Congress.

The way in which the powers granted in the Constitution "keep pace with the progress of the country" is illustrated in the case from which the following excerpt is taken: *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U.S. 1 (1877).

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Congress has power "to regulate commerce with foreign nations and among the several States" (Const. art. 1, sect. 8, par. 3); and "to establish post-offices and post-roads" (id., par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Art. 6, par. 2. A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.

Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the

railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 id. 489, 772; 13 id. 365; 14 id. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain

portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centres, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the

grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted.

The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another State entitled to the privileges of the act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose.

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21. EXECUTIVE OR ADMINISTRATIVE ORDER

Organization or operation of the federal government may be modified by executive or administrative order. Such orders are sometimes of such a nature as to constitute elaboration or implementation of the Constitution. An example of change in organization is seen in the order below taken from the *Federal Register*, Volume 11, No. 1 (Jan. 1, 1946).

EXECUTIVE ORDER 9666

DIRECTING THE RETURN OF THE COAST GUARD TO THE TREASURY DEPARTMENT

WHEREAS Executive Order No. 8929 of November 1, 1941 (6 F. R. 5581), directed that from that date and until further orders the Coast Guard should operate as a part of the Navy, subject to the orders of the Secretary of the Navy; and

WHEREAS the need for the operation of the Coast Guard as a part of the Navy no longer exists, its primary mission in operating as a part of the Navy having been accomplished:

NOW THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including Title I of the First War Powers Act, 1941 (55 Stat. 838), and as President of the United States, it is hereby directed that on and after January 1, 1946, the Coast Guard shall operate under the Department of the Treasury; and thereupon all authority, powers, and duties conferred upon or vested in the

Secretary of the Navy by any law, proclamation or Executive order affecting the Coast Guard, enacted or promulgated during the period the Coast Guard has been operating as a part of the Navy and now in effect, shall, to the extent that they affect the Coast Guard, vest in and be exercised by the Secretary of the Treasury.

This order is subject to the following exceptions, provisions, and conditions:

1. In the interest of expeditious demobilization and other exigencies of the Naval Service, such Coast Guard vessels, facilities, and personnel as the Secretary of the Treasury and the Secretary of the Navy may mutually agree upon shall continue to operate as a part of the Navy, subject to the orders of the Secretary of the Navy, for such additional time beyond January 1, 1946, as the agreement may provide.

2. The Coast Guard shall continue, for such period as may be mutually agreeable to the Secretary of the Treasury and the Secretary of the Navy, Air-Sea Rescue functions and the maintenance and operation of mid-ocean weather stations and air-sea navigational aids, under the directional control of the Navy; and all vessels, facilities, equipment and supplies required by the Coast Guard in connection with the maintenance and operation of such activities and not required by the Naval Establishment are authorized to be transferred to the jurisdiction of the Department of the Treasury for the use of the Coast Guard.

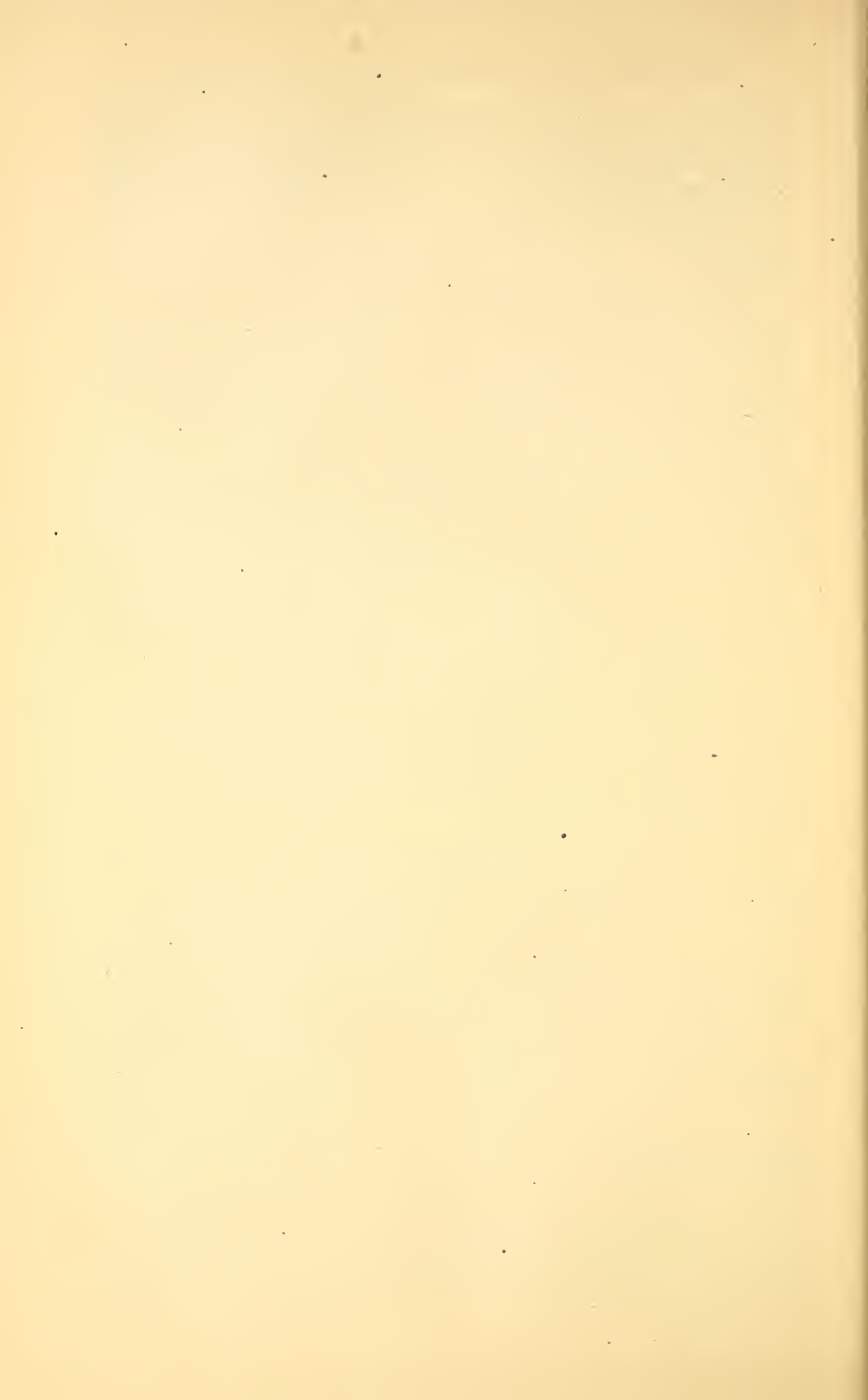
3. In the initiation, prosecution, and completion of disciplinary action, including remission and mitigation of punishments for any offense committed by any officer or enlisted man of the Coast Guard, the jurisdiction shall depend upon and be in accordance with the laws and regulations of the department having jurisdiction of the person of such offender at the various stages of such action.

4. In effecting the transfer herein prescribed no change shall be made until June 30, 1946, in existing methods of appropriation accounting, or in existing methods of disbursement for the Coast Guard, which shall continue until that date to be performed as heretofore by officers of the Navy or Coast Guard designated under existing regulations for that purpose. The appropriation accounts of the Coast Guard shall be kept on the general ledgers of the Navy Department until June 30, 1946, after which date they shall be transferred to the Treasury Department.

The said Executive Order No. 8929 of November 1, 1941, is hereby revoked.

HARRY S. TRUMAN

THE WHITE HOUSE
December 28, 1945



VI

The Nature of the Federal Union



A. Outstanding Commentaries

22. THE FEDERALIST, NO. 9, Alexander Hamilton—1787
23. THE FEDERALIST, NO. 15, Alexander Hamilton—1787
24. THE FEDERALIST, NO. 39, James Madison—1788
25. DEMOCRACY IN AMERICA, Alexis de Tocqueville—1835
26. THE AMERICAN COMMONWEALTH, James Bryce—1888

B. Views in the Civil War Period

27. A SOUTHERN VIEW, Judah P. Benjamin—1860–1861
28. ABRAHAM LINCOLN'S VIEW, Inaugural Address—1861
29. VIEW OF THE SUPREME COURT, *Texas v. White*—1868

C LASSICS as commentaries on the government established under the Constitution of 1789 are: (1) *The Federalist*, by Alexander Hamilton, James Madison, and John Jay, Americans; (2) *Democracy in America*, by Alexis de Tocqueville, a Frenchman; and (3) *The American Commonwealth*, by James Bryce, an Englishman.

THE FEDERALIST

A spirited contest over the adoption of the Constitution proposed by the Philadelphia Convention developed in the State of New York. Newspapers carried articles opposing the proposed government, some signed "Cato," others signed "Brutus." Articles supporting the proposed government, signed "Publius," also appeared in New York newspapers. The authors of the "Publius" articles were Alexander Hamilton, James Madison, and John Jay. Collected, these "Publius" articles constitute *The Federalist*.

In reading *The Federalist*, students will be reminded that the purpose of the writers was primarily to influence citizens to support the proposed Constitution. It is evident also that the words "confederacy" and "federal" had not yet taken on the meanings given them today.

The excerpts from *The Federalist* reprinted in this volume are taken from the edition copyrighted by Jacob Gideon, Junior, in 1819, printed in 1826 by Glazier and Company of Hallowell, Maine.

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THE NATURE OF THE
FEDERAL UNIONA. *Outstanding Commentaries*22. *THE FEDERALIST*

No. IX.

By Alexander Hamilton.

The Utility of the Union as a Safeguard against Domestic Faction and Insurrection.

A FIRM union will be of the utmost moment to the peace and liberty of the states, as a barrier against domestic faction and insurrection.

It is impossible to read the history of the petty republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions, by which they were kept perpetually vibrating between the extremes of tyranny and anarchy. If they exhibit occasional calms, these only serve as shortlived contrasts to the furious storms that are to succeed. If now and then intervals of felicity open themselves to view, we behold them with a mixture of regret arising from the reflection, that the pleasing scenes before us are soon to be overwhelmed by the tempestuous waves of sedition and party rage. If momentary rays of glory break forth from the gloom, while they dazzle us with a transient and fleeting brilliancy, they at the same time admonish us to lament, that the vices of government should pervert the direction, and tarnish the lustre, of those bright talents and exalted endowments, for which the favoured soils that produced them have been so justly celebrated.

From the disorders that disfigure the annals of those republics, the advocates of despotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty. They have decried all free government, as inconsistent with the order of society, and have indulged themselves in malicious exultation over its friends and partisans. Happily for mankind, stupendous fabrics reared on

the basis of liberty, which have flourished for ages, have in a few glorious instances refuted their gloomy sophisms. And, I trust, America will be the broad and solid foundation of other edifices not less magnificent, which will be equally permanent monuments of their error.

But it is not to be denied, that the portraits they have sketched of republican government, were too just copies of the originals from which they were taken. If it had been found impracticable to have devised models of a more perfect structure, the enlightened friends of liberty would have been obliged to abandon the cause of that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges, holding their offices during good behaviour; the representation of the people in the legislature, by deputies of their own election; these are either wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained, and its imperfections lessened or avoided. To this catalogue of circumstances, that tend to the melioration of popular systems of civil government, I shall venture, however novel it may appear to some, to add one more, on a principle which has been made the foundation of an objection to the new constitution; I mean the ENLARGEMENT of the ORBIT within which such systems are to revolve, either in respect to the dimensions of a single state, or to the consolidation of several smaller states into one great confederacy. The latter is that which immediately concerns the object under consideration. It will, however, be of use to examine the principle in its application to a single state, which shall be attended to in another place.

The utility of a confederacy, as well to suppress faction, and to guard the internal tranquillity of states, as to increase their external force and security, is in reality not a new idea. It has been practised upon in different countries and ages, and has received the sanction of the most approved writers on the subjects of politics. The opponents of the PLAN proposed have with great assiduity cited and circulated the observations of Montesquieu on the necessity of a contracted territory for a republican government. But they seem not to have been apprised of the sentiments of that great man expressed in another part of his work, nor to have adverted to the consequences of the principle to which they subscribe with such ready acquiescence.

When Montesquieu recommends a small extent for republics, the standards he had in view were of dimensions, far short of the limits of almost every one of these states. Neither Virginia, Massachusetts, Pennsylvania, New York, North Carolina, nor Georgia, can by any means be compared with the models from which he reasoned, and to which the terms of his

description apply. If we therefore receive his ideas on this point, as the criterion of truth, we shall be driven to the alternative, either of taking refuge at once in the arms of monarchy, or of splitting ourselves into an infinity of little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt. Some of the writers, who have come forward on the other side of the question, seem to have been aware of the dilemma; and have even been bold enough to hint at the division of the larger states, as a desirable thing. Such an infatuated policy, such a desperate expedient, might, by the multiplication of petty offices, answer the views of men, who possess not qualifications to extend their influence beyond the narrow circles of personal intrigue; but it could never promote the greatness or happiness of the people of America.

Referring the examination of the principle itself to another place, as has been already mentioned, it will be sufficient to remark here, that in the sense of the author who has been most emphatically quoted upon the occasion, it would only dictate a reduction of the SIZE of the more considerable MEMBERS of the union; but would not militate against their being all comprehended in one confederate government. And this is the true question, in the discussion of which we are at present interested.

So far are the suggestions of Montesquieu from standing in opposition to a general union of the states, that he explicitly treats of a CONFEDERATE REPUBLIC as the expedient for extending the sphere of popular government, and reconciling the advantages of monarchy with those of republicanism.

"It is very probable," says he,* "that mankind would have been obliged, at length, to live constantly under the government of a SINGLE PERSON, had they not contrived a kind of constitution, that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a CONFEDERATE REPUBLIC.

"This form of government is a convention by which several smaller *states* agree to become members of a larger *one*, which they intend to form. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.

"A republic of this kind, able to withstand an external force, may support itself without any internal corruption. The form of this society prevents all manner of inconveniences.

"If a single member should attempt to usurp the supreme authority, he could not be supposed to have an equal authority and credit in all the confederate states. Were he to have too great influence over one, this would alarm the rest. Were he to subdue a part, that which would still remain free might oppose him with forces independent of those which

* Spirit of Laws, Vol. I, Book IX, Chap. I.

"he had usurped, and overpower him before he could be settled in his usurpation.

"Should a popular insurrection happen in one of the confederate states, the others are able to quell it. Should abuse creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; the confederacy may be dissolved, and the confederates preserve their sovereignty.

"As this government is composed of small republics, it enjoys the internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies."

I have thought it proper to quote at length these interesting passages, because they contain a luminous abridgment of the principal arguments in favour of the union, and must effectually remove the false impressions which a misapplication of the other parts of the work was calculated to produce. They have, at the same time an intimate connexion with the more immediate design of this paper, which is to illustrate the tendency of the union to repress domestic faction and insurrection.

A distinction, more subtle than accurate, has been raised between a *confederacy* and a *consolidation* of the states. The essential characteristic of the first, is said to be the restriction of its authority to the members in their collective capacities, without reaching to the individuals of whom they are composed. It is contended, that the national council ought to have no concern with any object of internal administration. An exact equality of suffrage between the members, has also been insisted upon as a leading feature of a confederate government. These positions are, in the main, arbitrary; they are supported neither by principle nor precedent. It has indeed happened, that governments of this kind have generally operated in the manner which the distinction taken notice of supposes to be inherent in their nature; but there have been in most of them extensive exceptions to the practice, which serve to prove, as far as example will go, that there is no absolute rule on the subject. And it will be clearly shown, in the course of this investigation, that as far as the principle contended for has prevailed, it has been the cause of incurable disorder and imbecility in the government.

The definition of a *confederate republic* seems simply to be, "an assemblage of societies," or an association of two or more states into one state. The extent, modifications, and objects, of the federal authority, are mere matters of discretion. So long as the separate organization of the members be not abolished, so long as it exists by a constitutional necessity for local purposes, though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed constitution, so far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the senate, and leaves in their possession certain exclusive, and

very important, portions of the sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.

In the Lycian confederacy, which consisted of twenty-three CITIES, or republics, the largest were entitled to *three* votes in the COMMON COUNCIL, those of the middle class to *two*, and the smallest to *one*. The COMMON COUNCIL had the appointment of all the judges and magistrates of the respective CITIES. This was certainly the most delicate species of interference in their internal administration; for if there be any thing that seems exclusively appropriated to the local jurisdictions, it is the appointment of their own officers. Yet Montesquieu, speaking of this association, says, "Were I to give a model of an excellent confederate republic, it would be that of Lycia." Thus we perceive, that the distinctions insisted upon, were not within the contemplation of this enlightened writer; and we shall be led to conclude, that they are the novel refinements of an erroneous theory.

PUBLIUS.

23. THE FEDERALIST

No. XV.

By Alexander Hamilton.

Concerning the Defects of the Present Confederation, in Relation to the Principle of Legislation for the States in their Collective Capacities.

In the course of the preceding papers, I have endeavoured, my fellow-citizens, to place before you, in a clear and convincing light, the importance of union to your political safety and happiness. I have unfolded to you a complication of dangers to which you would be exposed, should you permit that sacred knot, which binds the people of America together, to be severed or dissolved by ambition or by avarice, by jealousy or by misrepresentation. In the sequel of the inquiry, through which I propose to accompany you, the truths intended to be inculcated will receive further confirmation from facts and arguments hitherto unnoticed. If the road, over which you will still have to pass, should in some places appear to you tedious or irksome, you will recollect, that you are in quest of information on a subject the most momentous, which can engage the attention of a free people; that the field through which you have to travel is in itself spacious, and that the difficulties of the journey have been unnecessarily increased by the mazes, with which sophistry has beset the way. It will be my aim to remove the obstacles to your progress, in as compendious a manner as it can be done, without sacrificing utility to despatch.

In pursuance of the plan, which I have laid down for the discussion of the subject, the point next in order to be examined, is the "insufficiency of the present confederation to the preservation of the union."

It may perhaps be asked, what need there is of reasoning or proof to illustrate a position, which is neither controverted nor doubted; to which the understandings and feelings of all classes of men assent; and which in substance is admitted by the opponents as well as by the friends of the new constitution? It must in truth be acknowledged, that however these may differ in other respects, they in general appear to harmonize in the opinion, that there are material imperfections in our national system, and that something is necessary to be done to rescue us from impending anarchy. The facts that support this opinion, are no longer objects of speculation. They have forced themselves upon the sensibility of the people at large, and have at length extorted from those, whose mistaken policy has had the principal share in precipitating the extremity at which we are arrived, a reluctant confession of the reality of many of those defects in the scheme of our federal government, which have been long pointed out and regretted by the intelligent friends of the union.

We may indeed, with propriety, be said to have reached almost the last stage of national humiliation. There is scarcely any thing that can wound the pride, or degrade the character, of an independent people, which we do not experience. Are there engagements, to the performance of which we are held by every tie respectable among men? These are the subjects of constant and unblushing violation. Do we owe debts to foreigners, and to our own citizens, contracted in a time of imminent peril, for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. Have we valuable territories and important posts in the possession of a foreign power, which, by express stipulations, ought long since to have been surrendered? These are still retained, to the prejudice of our interests not less than of our rights. Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government.* Are we even in a condition to remonstrate with dignity? The just imputations on our own faith, in respect to the same treaty, ought first to be removed. Are we entitled, by nature and compact, to a free participation in the navigation of the Mississippi? Spain excludes us from it. Is public credit an indispensable resource in time of public danger? We seem to have abandoned its cause as desperate and irretrievable. Is commerce of importance to national wealth? Ours is at the lowest point of declension. Is respectability in the eyes of foreign powers, a safeguard against foreign encroachments? The imbecility of our government even forbids them to treat with us: our ambassadors abroad are the mere pageants of mimic sovereignty. Is a violent and unnatural decrease in the value of land, a symptom of national distress? The price of improved land, in most parts of the country, is much lower than can be accounted for by the quantity of waste land at market, and can only be fully explained by that want of private and public confidence, which are so alarmingly prevalent among all ranks, and which have a direct tendency to depreciate property of every kind. Is private

* I mean for the union.

credit the friend and patron of industry? That most useful kind which relates to borrowing and lending, is reduced within the narrowest limits, and this still more from an opinion of insecurity than from a scarcity of money. To shorten an enumeration of particulars which can afford neither pleasure nor instruction, it may in general be demanded, what indication is there of national disorder, poverty, and insignificance, that could befall a community so peculiarly blessed with natural advantages as we are, which does not form a part of the dark catalogue of our public misfortunes?

This is the melancholy situation to which we have been brought by those very maxims and counsels, which would now deter us from adopting the proposed constitution; and which, not content with having conducted us to the brink of a precipice, seem resolved to plunge us into the abyss that awaits us below. Here, my countrymen, impelled by every motive that ought to influence an enlightened people, let us make a firm stand for our safety, our tranquility, our dignity, our reputation. Let us at last break the fatal charm which has too long seduced us from the paths of felicity and prosperity.

It is true, as has been before observed, that facts too stubborn to be resisted, have produced a species of general assent to the abstract proposition, that there exist material defects in our national system; but the usefulness of the concession, on the part of the old adversaries of federal measures, is destroyed by a strenuous opposition to a remedy, upon the only principles that can give it a chance of success. While they admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy. They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority, without a diminution of state authority; at sovereignty in the union, and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*. This renders a full display of the principal defects of the confederation necessary, in order to show, that the evils we experience do not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended, otherwise than by an alteration in the very elements and main pillars of the fabric.

The great and radical vice, in the construction of the existing confederation, is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist. Though this principle does not run through all the powers delegated to the union; yet it pervades and governs those on which the efficacy of the rest depends: except, as to the rule of apportionment, the United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that, though in

theory, their resolutions concerning those objects are laws, constitutionally binding on the members of the union; yet in practice, they are mere recommendations, which the states observe or disregard at their option.

It is a singular instance of the capriciousness of the human mind, that after all the admonitions we have had from experience on this head, there should still be found men, who object to the new constitution, for deviating from a principle which has been found the bane of the old; and which is, in itself, evidently incompatible with the idea of a GOVERNMENT; a principle, in short, which, if it is to be executed at all, must substitute the violent and sanguinary agency of the sword, to the mild influence of the magistracy.

There is nothing absurd or impracticable, in the idea of a league or alliance between independent nations, for certain defined purposes precisely stated in a treaty; regulating all the details of time, place, circumstance, and quantity; leaving nothing to future discretion; and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war; of observance and non-observance, as the interests or passions of the contracting powers dictate. In the early part of the present century, there was an epidemical rage in Europe for this species of compacts; from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power, and the peace of that part of the world, all the resources of negotiation were exhausted, and triple and quadruple alliances were formed; but they were scarcely formed before they were broken, giving an instructive, but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith; and which oppose general considerations of peace and justice, to the impulse of any immediate interest or passion.

If the particular states in this country are disposed to stand in a similar relation to each other, and to drop the project of a general DISCRETIONARY SUPERINTENDENCE, the scheme would indeed be pernicious, and would entail upon us all the mischiefs which have been enumerated under the first head; but it would have the merit of being, at least, consistent and practicable. Abandoning all views towards a confederate government, this would bring us to a simple alliance, offensive and defensive; and would place us in a situation to be alternately friends and enemies of each other, as our mutual jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us.

But if we are unwilling to be placed in this perilous situation; if we still adhere to the design of a national government, or, which is the same thing, of a superintending power, under the direction of a common council, we must resolve to incorporate into our plan those ingredients, which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the union to the persons of the citizens . . . the only proper objects of government.

Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws, will in fact amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways; by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy; or by the COERCION of arms. The first kind can evidently apply only to men: the last kind must of necessity be employed against bodies politic, or communities, or states. It is evident, that there is no process of a court by which their observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty; but these sentences can only be carried into execution by the sword. In an association, where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war, and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.

There was a time when we were told that breaches, by the states, of the regulations of the federal authority, were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the union. This language, at the present day, would appear as wild as a great part of what we now hear from the same quarter will be thought, when we shall have received further lessons from that best oracle of wisdom, experience. It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power. Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number, than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons, of whom they are composed, into improprieties and excesses, for which they would blush in a private capacity.

In addition to all this, there is, in the nature of sovereign power, an impatience of control, which disposes those who are invested with the exercise of it, to look with an evil eye upon all external attempts to restrain or direct its operations. From this spirit it happens, that in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a

kind of eccentric tendency in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common centre. This tendency is not difficult to be accounted for. It has its origin in the love of power. Power controled or abridged is almost always the rival and enemy of that power by which it is controled or abridged. This simple proposition will teach us, how little reason there is to expect, that the persons entrusted with the administration of the affairs of the particular members of a confederacy, will at all times be ready, with perfect good humour, and an unbiassed regard to the public weal, to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of man.

If, therefore, the measures of the confederacy cannot be executed, without the intervention of the particular administrations, there will be little prospect of their being executed at all. The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves. They will consider the conformity of the thing proposed or required to their immediate interests or aims; the momentary conveniencies or inconveniencies that would attend its adoption. All this will be done; and in a spirit of interested and suspicious scrutiny, without that knowledge of national circumstances and reasons of state, which is essential to a right judgment, and with that strong predilection in favour of local objects, which can hardly fail to mislead the decision. The same process must be repeated in every member of which the body is constituted; and the execution of the plans, framed by the councils of the whole, will always fluctuate on the discretion of the ill-informed and prejudiced opinion of every part. Those who have been conversant in the proceedings of popular assemblies; who have seen how difficult it often is, when there is no exterior pressure of circumstances, to bring them to harmonious resolutions on important points, will readily conceive, how impossible it must be to induce a number of such assemblies, deliberating at a distance from each other, at different times, and under different impressions, long to cooperate in the same views and pursuits.

In our case, the concurrence of thirteen distinct sovereign wills is requisite under the confederation, to the complete execution of every important measure, that proceeds from the union. It has happened, as was to have been foreseen. The measures of the union have not been executed; the delinquencies of the states have, step by step, matured themselves to an extreme, which has at length arrested all the wheels of the national government, and brought them to an awful stand. Congress at this time scarcely possess the means of keeping up the forms of administration, till the states can have time to agree upon a more substantial substitute for the present shadow of a federal government. Things did not come to this desperate extremity at once. The causes which have been specified, produced at first only unequal and disproportionate degrees of compliance with the requisitions of the union. The greater deficiencies of some states

furnished the pretext of example, and the temptation of interest to the complying, or at least delinquent states. Why should we do more in proportion than those who are embarked with us in the same political voyage? Why should we consent to bear more than our proper share of the common burthen? These were suggestions which human selfishness could not withstand, and which even speculative men, who looked forward to remote consequences, could not without hesitation combat. Each state, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads, and to crush us beneath its ruins.

PUBLIUS.

24. *THE FEDERALIST*

No. XXXIX.

By James Madison.

The conformity of the plan to republican principles: an objection in respect to the powers of the convention, examined.

The last paper having concluded the observations, which were meant to introduce a candid survey of the plan of government reported by the convention, we now proceed to the execution of that part of our undertaking.

The first question that offers itself is, whether the general form and aspect of the government be strictly republican? It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honourable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different states, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with a hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each

other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort, for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable proportion, or a favoured class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honourable title of republic. It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every state in the union, some or other of the officers of government are appointed indirectly only by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the coordinate branches of the legislature. According to all the constitutions also, the tenure of the highest offices is extended to a definite period, and in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions, again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behaviour.

On comparing the constitution planned by the convention, with the standard here fixed, we perceive at once, that it is, in the most rigid sense, conformable to it. The house of representatives, like that of one branch at least of all the state legislatures, is elected immediately by the great body of the people. The senate, like the present congress, and the senate of Maryland, derives its appointment indirectly from the people. The president is indirectly derived from the choice of the people, according to the example in most of the states. Even the judges, with all other officers of the union, will, as in the several states, be the choice, though a remote choice, of the people themselves. The duration of the appointments is equally conformable to the republican standard, and to the model of the state constitutions. The house of representatives is periodically elective, as in all the states; and for the period of two years, as in the state of South Carolina. The senate is elective, for the period of six years; which is but one year more than the period of the senate of Maryland; and but two more than that of the senates of New York and Virginia. The president is to continue in office for the period of four years; as in New York

and Delaware, the chief magistrate is elected for three years, and in South Carolina for two years. In the other states the election is annual. In several of the states, however, no explicit provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia, he is not impeachable till out of office. The president of the United States is impeachable at any time during his continuance in office. The tenure by which the judges are to hold their places, is, as it unquestionably ought to be, that of good behaviour. The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case, and the example of the state constitutions.

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the state governments; and in its express guarantee of the republican form to each of the latter.

But it was not sufficient, say the adversaries of the proposed constitution, for the convention to adhere to the republican form. They ought, with equal care, to have preserved the *federal* form, which regards the union as a *confederacy* of sovereign states; instead of which, they have framed a *national* government, which regards the union as a *consolidation* of the states. And it is asked, by what authority this bold and radical innovation was undertaken? The handle which has been made of this objection requires, that it should be examined with some precision.

Without inquiring into the accuracy of the distinction on which the objection is founded, it will be necessary to a just estimate of its force, first, to ascertain the real character of the government in question; secondly, to inquire how far the convention were authorized to propose such a government; and thirdly, how far the duty they owed to their country, could supply any defect of regular authority.

First. In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears, on one hand, that the constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state . . . the authority of the people themselves. The act, therefore, establishing the constitution, will not be a *national*, but a *federal* act.

That it will be a federal, and not a national act, as these terms are understood by the objectors, the act of the people, as forming so many

independent states, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the union, nor from that of a *majority* of the states. It must result from the *unanimous* assent of the several states that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority; in the same manner as the majority in each state must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the states, as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each state, in ratifying the constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new constitution will, if established, be a *federal*, and not a *national* constitution.

The next relation is, to the sources from which the ordinary powers of government are to be derived. The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in a legislature of a particular state. So far the government is *national*, not *federal*. The senate, on the other hand, will derive its powers from the states, as political and coequal societies; and these will be represented on the principle of equality in the senate, as they now are in the existing congress. So far the government is *federal* not *national*. The executive power will be derived from a very compound source. The immediate election of the president is to be made by the states in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies; partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act, they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government, it appears to be of a mixed character, presenting at least as many *federal* as *national* features.

The difference between a federal and national government, as it relates to the *operation of the government*, is, by the adversaries of the plan of the convention, supposed to consist in this, that in the former, the powers operate on the political bodies composing the confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which states may be parties, they must be viewed and proceeded against in their collective and political capacities

only. But the operation of the government on the people in their individual capacities, in its ordinary and most essential proceedings, will, on the whole, in the sense of its opponents, designate it, in this relation, a *national* government.

But if the government be national, with regard to the *operation* of its powers, it changes its aspect again, when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects. It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the constitution; and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local governments; or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated.

If we try the constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal on the other hand, the concurrence of each state in the union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention, is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *states*, not by *citizens*, it departs from the *national*, and advances toward the *federal* character. In rendering the concurrence of less than the whole number of states sufficient, it loses again the *federal*, and partakes of the *national* character.

The proposed constitution, therefore, even when tested by the rules

laid down by its antagonists, is, in strictness, neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal, and partly national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.

PUBLIUS.

25. DEMOCRACY IN AMERICA—1835

Alexis Charles Henri Clerel de Tocqueville (1805–1859) was born in Paris. In his twenty-first year he assumed duties in the French magistracy. In 1831–1832, he and his close friend Gustave de Beaumont spent nine months visiting America. They traveled widely in the states studying the people and the institutions. After their return to France, Tocqueville published Part I of *Democracy in America* in 1835, and Part II in 1840. A very interesting introduction will be found in the 1945 publication of Tocqueville's *Democracy in America* edited by Phillips Bradley.

Tocqueville's emphasis on the sovereignty of the people in the reading below may be profitably compared with Friedrich's view of the "constituent power" (reading no. 18, *supra*) and Bryce's "profound difference" between the parliament in British government and the congress in the United States (reading no. 26, *infra*). The excerpt below is taken from Alexis de Tocqueville, *Democracy in America*, translated by Henry Reeve, third American edition (New York: George Adlard, 1839).

THE PRINCIPLE OF THE SOVEREIGNTY OF THE PEOPLE IN AMERICA.

Whenever the political laws of the United States are to be discussed, it is with the doctrine of the sovereignty of the people that we must begin.

The principle of the sovereignty of the people, which is to be found, more or less, at the bottom of almost all human institutions, generally remains concealed from view. It is obeyed without being recognised, or if for a moment it be brought to light, it is hastily cast back into the gloom of the sanctuary.

'The will of the nation' is one of those expressions which have been most profusely abused by the wily and the despotic of every age. To the eyes of some it has been represented by the venal suffrages of a few of the satellites of power; to others, by the votes of a timid or an interested minority; and some have even discovered it in the silence of a people, on the supposition that the fact of submission established the right of command.

In America, the principle of the sovereignty of the people is not either barren or concealed, as it is with some other nations; it is recog-

nised by the customs and proclaimed by the laws; it spreads freely, and arrives without impediment at its most remote consequences. If there be a country in the world where the doctrine of the sovereignty of the people can be fairly appreciated, where it can be studied in its application to the affairs of society, and where its dangers and its advantages may be foreseen, that country is assuredly America.

I have already observed that, from their origin, the sovereignty of the people was the fundamental principle of the greater number of British colonies in America. It was far, however, from then exercising as much influence on the government of society as it now does. Two obstacles, the one external, the other internal, checked its invasive progress.

It could not ostensibly disclose itself in the laws of colonies which were still constrained to obey the mother-country; it was therefore obliged to spread secretly, and to gain ground in the provincial assemblies, and especially in the townships.

American society was not yet prepared to adopt it with all its consequences. The intelligence of New England, and the wealth of the country to the south of the Hudson, (as I have shown in the preceding chapter,) long exercised a sort of aristocratic influence, which tended to limit the exercise of social authority within the hands of a few. The public functionaries were not universally elected, and the citizens were not all of them electors. The electoral franchise was every where placed within certain limits, and made dependent on a certain qualification, which was exceedingly low in the North and more considerable in the South.

The American revolution broke out, and the doctrine of the sovereignty of the people, which had been nurtured in the townships, took possession of the State: every class was enlisted in its cause; battles were fought, and victories obtained for it; until it became the law of laws.

A scarcely less rapid change was effected in the interior of society, where the law of descent completed the abolition of local influences.

At the very time when this consequence of the laws and of the revolution became apparent to every eye, victory was irrevocably pronounced in favor of the democratic cause. All power was, in fact, in its hands, and resistance was no longer possible. The higher orders submitted without a murmur and without a struggle to an evil which was thenceforth inevitable. The ordinary fate of falling powers awaited them; each of their several members followed his own interest; and as it was impossible to wring the power from the hands of a people which they did not detest sufficiently to brave, their only aim was to secure its good-will at any price. The most democratic laws were consequently voted by the very men whose interests they impaired: and thus, although the higher classes did not excite the passions of the people against their order, they accelerated the triumph of the new state of things; so that, by a singular change, the democratic impulse was found to be most irresistible in the very States where the aristocracy had the firmest hold.

The State of Maryland, which had been founded by men of rank, was

the first to proclaim universal suffrage, and to introduce the most democratic forms into the conduct of its government.

When a nation modifies the elective qualification, it may easily be foreseen that sooner or later that qualification will be entirely abolished. There is no more invariable rule in the history of society: the farther electoral rights are extended, the more is felt the need of extending them; for after each concession the strength of the democracy increases, and its demands increase with its strength. The ambition of those who are below the appointed rate is irritated in exact proportion to the great number of those who are above it. The exception at last becomes the rule, concession follows concession, and no stop can be made short of universal suffrage.

At the present day the principle of the sovereignty of the people has acquired, in the United States, all the practical development which the imagination can conceive. It is unencumbered by those fictions which have been thrown over it in other countries, and it appears in every possible form according to the exigency of the occasion. Sometimes the laws are made by the people in a body, as at Athens; and sometimes its representatives, chosen by universal suffrage, transact business in its name, and almost under its immediate control.

In some countries a power exists which, though it is in a degree foreign to the social body, directs it, and forces it to pursue a certain track. In others the ruling force is divided, being partly within and partly without the ranks of the people. But nothing of the kind is to be seen in the United States; there society governs itself for itself. All power centres in its bosom; and scarcely an individual is to be met with who would venture to conceive, or, still more, to express, the idea of seeking it elsewhere. The nation participates in the making of its laws by the choice of its legislators, and in the execution of them by the choice of the agents of the executive government; it may almost be said to govern itself, so feeble and so restricted is the share left to the administration, so little do the authorities forget their popular origin and the power from which they emanate.

26. *THE AMERICAN COMMONWEALTH*—1888

James Bryce (1838–1922) was an outstanding British jurist, statesman, and author. He was born in Belfast of a Scottish family. He served in many outstanding positions including those of Regius Professor of Civil Law at Oxford University (1870–1893) and Ambassador of Great Britain to the United States (1907–1912). Among his many writings *The American Commonwealth*, first published in 1888, is one of the best known. In 1914, he became the first Viscount Bryce.

In the reading below Bryce presents clearly points which should be remembered by all students of American government.¹

¹ James Bryce, *The American Commonwealth*, third edition, Vol. I (The Macmillan Company, 1900); courtesy of The Macmillan Company.

NATURE OF THE FEDERAL GOVERNMENT

The acceptance of the Constitution of 1789 made the American people a nation. It turned what had been a League of States into a Federal State, by giving it a National Government with a direct authority over all citizens. But as this national government was not to supersede the governments of the States, the problem which the Constitution-makers had to solve was two-fold. They had to create a central government. They had also to determine the relations of this central government to the States as well as to the individual citizen. An exposition of the Constitution and criticism of its working must therefore deal with it in these two aspects, as a system of national government built up of executive powers and legislative bodies, like the monarchy of England or the republic of France, and as a Federal system linking together and regulating the relations of a number of commonwealths which are for certain purposes, but for certain purposes only, subordinated to it. It will conduce to clearness if these two aspects are kept distinct; and the most convenient course will be to begin with the former, and first to describe the American system as a National system, leaving its Federal character for the moment on one side.

It must, however, be remembered that the Constitution does not profess to be a complete scheme of government, creating organs for the discharge of all the functions and duties which a civilized community undertakes. It presupposes the State governments. It assumes their existence, their wide and constant activity. It is a scheme designed to provide for the discharge of such and so many functions of government as the States did not, and indeed could not, or at any rate could not adequately, possess and discharge. It is therefore, so to speak, the complement and crown of the State Constitutions, which must be read along with it and into it in order to make it cover the whole field of civil government, as do the Constitutions of such countries as France, Belgium, Italy.

The administrative, legislative, and judicial functions for which the Federal Constitution provides are those relating to matters which must be deemed common to the whole nation, either because all the parts of the nation are alike interested in them, or because it is only by the nation as a whole that they can be satisfactorily undertaken. The chief of these common or national matters are—

War and peace: treaties and foreign relations generally.

Army and navy.

Federal courts of justice.

Commerce, foreign and domestic.

Currency.

Copyright and patents.

The post-office and post roads.

Taxation for the foregoing purposes, and for the general support of the Government.

The protection of citizens against unjust or discriminating legislation by any State.

This list includes the subjects upon which the national legislature has the right to legislate, the national executive to enforce the Federal laws and generally to act in defence of national interests, the national judiciary to adjudicate. All other legislation and administration is left to the several States, without power of interference by the Federal legislature or Federal executive.

Such then being the sphere of the National government, let us see in what manner it is constituted, of what departments it consists.

The framers of this government set before themselves four objects as essential to its excellence, viz.—

Its vigour and efficiency.

The independence of each of its departments (as being essential to the permanency of its form).

Its dependence on the people.

The security under it of the freedom of the individual.

The first of these objects they sought by creating a strong executive, the second by separating the legislative, executive, and judicial powers from one another, and by the contrivance of various checks and balances, the third by making all authorities elective and elections frequent, the fourth both by the checks and balances aforesaid, so arranged as to restrain any one department from tyranny, and by placing certain rights of the citizen under the protection of the written Constitution.

They had neither the rashness nor the capacity necessary for constructing a Constitution *a priori*. There is wonderfully little inventiveness in the world, and perhaps least of all has been shown in the sphere of political institutions. These men, practical politicians who knew how infinitely difficult a business government is, desired no bold experiments. They preferred, so far as circumstances permitted, to walk in the old paths, to follow methods which experience had tested. Accordingly they started from the system on which their own colonial governments, and afterwards their State governments, had been conducted. This system bore a general resemblance to the British Constitution; and in so far it may with truth be said that the British Constitution became a model for the new national government. They held England to be the freest and best-governed country in the world, but were resolved to avoid the weak points which had enabled King George III. to play the tyrant, and which rendered English liberty, as they thought, far inferior to that which the constitutions of their own States secured. With this venerable mother, and these children, better in their judgment than the mother, before their eyes, they created an executive magistrate, the President, on the model of the State Governor, and of the British Crown. They created a legislature

of two Houses, Congress, on the model of the two Houses of their State legislatures, and of the British Parliament. And following the precedent of the British judges, irremovable except by the Crown and Parliament combined, they created a judiciary appointed for life, and irremovable save by impeachment.

In these great matters, however, as well as in many lesser matters, they copied not so much the Constitution of England as the Constitutions of their several States, in which, as was natural, many features of the English Constitution had been embodied. It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself. To insist on this is not to detract from the glory of that illustrious body, for if we are to credit them with less inventiveness than has sometimes been claimed for them, we must also credit them with a double portion of the wisdom which prefers experience to *a priori* theory, and the sagacity which selects the best materials from a mass placed before it, aptly combining them to form a new structure.

Of minor divergences between their work and the British Constitution I shall speak subsequently. But one profound difference must be noted here. The British Parliament had always been, was then, and remains now, a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the succession to the crown, interfere with the course of justice, extinguish the most sacred private rights of the citizen. Between it and the people at large there is no legal distinction, because the whole plenitude of the people's rights and powers resides in it, just as if the whole nation were present within the chamber where it sits. In point of legal theory it is the nation, being the historical successor of the Folk Moot of our Teutonic forefathers. Both practically and legally, it is to-day the only and the sufficient depository of the authority of the nation; and is therefore, within the sphere of law, irresponsible and omnipotent.

In the American system there exists no such body. Not merely Congress alone, but also Congress and the President conjoined, are subject to the Constitution, and cannot move a step outside the circle which the Constitution has drawn around them. If they do, they transgress the law and exceed their powers. Such acts as they may do in excess of their powers are void, and may be, indeed ought to be, treated as void by the meanest citizen. The only power which is ultimately sovereign, as the British Parliament is always and directly sovereign, is the people of the States, acting in the manner prescribed by the Constitution, and capable in that manner of passing any law whatever in the form of a constitutional amendment.

This fundamental divergence from the British system is commonly said to have been forced upon the men of 1787 by the necessity, in order to safeguard the rights of the several States, of limiting the competence of

the national government. But even supposing there had been no States to be protected, the jealousy which the American people felt of those whom they chose to govern them, their fear lest one power in the government should absorb the rest, their anxiety to secure the primordial rights of the citizens from attack, either by magistrate or by legislature, would doubtless have led, as happened with the earlier constitutions of revolutionary France, to the creation of a supreme constitution or fundamental instrument of government, placed above and controlling the national legislature itself. They had already such fundamental instrument in the charters of the colonies, which had passed into the constitutions of the several States; and they would certainly have followed, in creating their national constitution, a precedent which they deemed so precious.

The subjection of all the ordinary authorities and organs of government to a supreme instrument expressing the will of the sovereign people, and capable of being altered by them only, has been usually deemed the most remarkable novelty of the American system. But it is merely an application to the wider sphere of the nation, of a plan approved by the experience of the several States. And the plan had, in these States, been the outcome rather of a slow course of historical development than of conscious determination taken at any one point of their progress from petty settlements to powerful republics. Nevertheless, it may well be that the minds of the leaders who guided this development were to some extent influenced and inspired by recollections of the English Commonwealth of the seventeenth century, which had seen the establishment, though for a brief space only, of a genuine supreme or rigid constitution, in the form of the famous Instrument of Government of A.D. 1653, and some of whose sages had listened to the discourses in which James Harrington, one of the most prescient minds of that great age, showed the necessity for such a constitution, and laid down its principles, suggesting that, in order to give it the higher authority, it should be subscribed by the people themselves.

We may now proceed to consider the several departments of the National Government. It will be simplest to treat of each separately, and then to examine the relations of each to the others, reserving for subsequent chapters an account of the relations of the National Government as a whole to the several States.

B. *Views in the Civil War Period*

Some of the questions which were left unanswered when the Constitution was adopted in 1789 became troublesome about 1860. Different views as to the nature of the union and as to the relationships of the several States to the central government, expressed by some of the leaders in the period of conflict, are given below.

27. A SOUTHERN VIEW

Judah Philip Benjamin (1811-1884), a native of the Virgin Islands while they were under British control, came to the United

States with his parents about 1813. The Benjamins lived first in North Carolina, then in South Carolina. Judah P. became an American citizen when his father secured naturalization papers in 1826. About 1828, after studying at Yale, he went to New Orleans, where he was admitted to the bar in 1832. In 1853, he became a member of the Senate of the United States, from Louisiana. Benjamin served as the "most accomplished statesman" in the cabinet of the Southern Confederacy. After the war, he escaped to England and became an outstanding British barrister. For an interesting account of his life, see Robert Douthat Meade, *Judah P. Benjamin, Confederate Statesman*.

Below are excerpts from speeches of Benjamin delivered in the Senate as reported in the *Congressional Globe*, December 31, 1860, and January 2, 1861. The word "confederacy" is used by Benjamin as it was by Hamilton to refer to the federal union. Indeed, in the quotation from John Quincy Adams, used by Benjamin, reference is made to "the confederated nation." Some students may be interested in reading John C. Calhoun, *A Disquisition on Government* and *A Discourse on the Constitution and Government of the United States*, and also *A Constitutional View of the Late War Between the States* by Alexander H. Stephens, who served as Vice President of the Confederate States.

[December 31, 1860]

Mr. President, the State of South Carolina, with a unanimity scarcely with parallel in history, has dissolved the union which connects her with the other States of the confederacy, and declared herself independent. We, the representatives of those remaining States, stand here to-day, bound either to recognize that independence, or to overthrow it; either to permit her peaceful secession from the confederacy, or to put her down by force of arms. That is the issue. That is the sole issue. No artifice can conceal it. No attempts by men to disguise it from their own consciences, and from an excited or alarmed public, can suffice to conceal it. Those attempts are equally futile and disingenuous. As for the attempted distinction between coercing a State, and forcing all the people of the State, by arms, to yield obedience to an authority repudiated by the sovereign will of the State, expressed in its most authentic form, it is as unsound in principle as it is impossible of practical application. Upon that point, however, I shall have something to say a little further on.

If we elevate ourselves, Mr. President, to the height from which we are bound to look in order to embrace all the vast consequence that must result from our decision, we are not permitted to ignore the fact that our determination does not involve the State of South Carolina alone. Next week, Mississippi, Alabama, and Florida, will have declared themselves independent; the week after, Georgia; and a little later, Louisiana; soon, very soon, to be followed by Texas and Arkansas. I confine myself purposely to these eight States, because I wish to speak only of those whose action we know with positive certainty, and which no man can for a moment pretend to controvert. I designedly exclude others, about whose action I feel equally confident, although others may raise a cavil.

Now, sir, shall we recognize the fact that South Carolina has become an independent State, or shall we wage war against her? And first as to her right. I do not agree with those who think it idle to discuss that right. In a great crisis like this, when the right asserted by a sovereign State is questioned, a decent respect for the opinions of mankind at least requires that those who maintain that right, and mean to act upon it, should state the reasons upon which they maintain it. If, in the discussion of this question, I shall refer to familiar principles, it is not that I deem it at all necessary to call the attention of members here to them; but because they naturally fall within the scope of my argument, which might otherwise prove unintelligible.

From the time that this people declared its independence of Great Britain, the right of the people to self-government in its fullest and broadest extent has been a cardinal principle of American liberty. None deny it. And in that right, to use the language of the Declaration itself, is included the right whenever a form of government becomes destructive of their interests or their safety, "to alter or to abolish it, and to institute a new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness." I admit that there is a principle that modifies this power, to which I shall presently advert; but leaving that principle for a moment out of view, I say that there is no other modification which, consistently with our liberty, we can admit, and that the right of the people of one generation, in convention duly assembled, to alter the institutions bequeathed by their fathers is inherent, inalienable, not susceptible of restriction; that by the same power under which one Legislature can repeal the act of a former Legislature, so can one convention of the people duly assembled, repeal the acts of a former convention of the people duly assembled; and that it is in strict and logical deduction from this fundamental principle of American liberty, that South Carolina has adopted the form in which she has declared her independence. She has in convention duly assembled in 1860, repealed an ordinance passed by her people in convention duly assembled in 1788. If no interests of third parties were concerned, if no question of compact intervened, all must admit the inherent power—the same inherent power which authorizes a Legislature to repeal a law, subject to the same modifying principle, that where the rights of others than the people who passed the law are concerned, those rights must be respected and cannot be infringed by those who descend from the first Legislature or who succeed them. If a law be passed by a Legislature impairing a contract, that law is void, not because the Legislature under ordinary circumstances would not have the power to repeal a law of its predecessor but because by repealing a law of its predecessor involving a contract, it exercises rights in which third persons are interested, and over which they are entitled to have an equal control. So in the case of a convention of the people assuming to act in repeal of an ordinance which showed their adherence to the Constitution of the United States, the power

is inherently in them, subject only to this modification: that they are bound to exercise it with due regard to the obligations imposed upon them by the compact with others.

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We have then, sir, in the case of South Carolina, so far as the duly organized convention is concerned, the only body that could speak the will of this generation in repeal of the ordinance passed by their fathers in 1788; and I say again, if no third interests intervened by a compact binding upon their faith, their power to do so is inherent and complete. But, sir, there is a compact, and no man pretends that the generation of to-day is not bound by the compacts of the fathers; but, to use the language of Mr. Webster, a bargain broken on one side is a bargain broken on all; and the compact is binding upon the generation of to-day only if the other parties to the compact have kept their faith.

This is no new theory, nor is practice upon it without precedent. I say that it was precisely upon this principle that this Constitution was formed. I say that the old Articles of Confederacy provided in express terms that they should be perpetual; that they should never be amended or altered without the consent of all the States. I say that the delegates of States unwilling that that Confederation should be altered or amended, appealed to that provision in the convention which formed the Constitution, and said: "If you do not satisfy us by the new provisions, we will prevent your forming your new government, because your faith is plighted, because you have agreed that there shall be no change in it unless with the consent of all." This was the argument of Luther Martin, it was the argument of Paterson, of New Jersey, and of large numbers of other distinguished members of the convention. Mr. Madison answered it. Mr. Madison said, in reply to that:

"It has been alleged that the Confederation having been formed by unanimous consent, could be dissolved by unanimous consent only. Does this doctrine result from the nature of compacts? Does it arise from any particular stipulation in the Articles of Confederation? If we consider the Federal Union as analogous to the fundamental compact by which individuals compose one society, and which must, in its theoretic origin at least, have been the unanimous act of the component members, it cannot be said that no dissolution of the compact can be effected without unanimous consent. A breach of the fundamental principles of the compact, by a part of the society, would certainly absolve the other part from their obligations to it."

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"If we consider the Federal Union as analogous, not to the social compacts among individual men, but to the conventions among individual States, what is the doctrine resulting from these conventions? Clearly, according to the expositors of the law of nations, that a breach of any one article, by any one party, leaves all the other parties at liberty to consider the whole convention as dissolved, unless they choose rather to compel the delinquent party to repair the breach. In some treaties, indeed, it is expressly stipulated that a violation

of particular articles shall not have this consequence, and even that particular articles shall remain in force during war, which is, in general, understood to dissolve all subsisting treaties. But are there any exceptions of this sort to the Articles of Confederation? So far from it, that there is not even an express stipulation that force shall be used to compel an offending member of the Union to discharge its duty."—*Madison Papers of Debates in the Federal Convention*, vol. 5., pp. 206, 207.

I need scarcely ask, Mr. President, if anybody has found in the Constitution of the United States any article providing, by express stipulation, that force shall be used to compel an offending member of the Union to discharge its duty. Acting on that principle, nine States of the Confederation seceded from the Confederation, and formed a new Government. They formed it upon the express ground that some of the States had violated their compact. Immediately after, two other States seceded and joined them. They left two alone, Rhode Island and North Carolina; and here is my answer to the Senator from Wisconsin, [Mr. Doolittle,] who asked me the other day, if thirty-three States could expel one, inasmuch as one had the right to leave thirty-three: I point him to the history of our country, to the acts of the fathers, as a full answer upon that subject. After this Government had been organized; after every department had been in full operation for some time; after you had framed your navigation laws, and provided what should be considered as ships and vessels of the United States, North Carolina and Rhode Island were still foreign nations, and so treated by you, so treated by you in your laws; and in September, 1789, Congress passed an act authorizing the citizens of the States of North Carolina and Rhode Island to enjoy all the benefits attached to owners of ships and vessels of the United States up to the 1st of the following January—gave them that much more time to come into the new Union, if they thought proper; if not, they were to remain as foreign nations. Here is the history of the formation of this Constitution, so far as it involves the power of the States to secede from a Confederation, and to form new confederacies to suit themselves.

Now, Mr. President, there is a difficulty in this matter, which was not overlooked by the framers of the Constitution. One State may allege that the compact has been broken, and others may deny it: who is to judge? When pecuniary interests are involved, so that a case can be brought up before courts of justice, the Constitution has provided a remedy within itself. It has declared that no act of a State, either in convention or by Legislature, or in any other manner, shall violate the Constitution of the United States, and it has provided for a supreme judiciary to determine cases arising in law or equity which may involve the construction of the Constitution or the construction of such laws.

But, sir, suppose infringements on the Constitution in political matters, which from their very nature cannot be brought before the court? That was a difficulty not unforeseen; it was debated upon propositions that were made to meet it. Attempts were made to give power to this

Federal Government in all its departments, one after the other, to meet that precise case, and the convention sternly refused to admit any. It was proposed to enable the Federal Government, through the action of Congress, to use force. That was refused. It was proposed to give to the President of the United States the nomination of State Governors, and to give them a veto on State laws, so as to preserve the supremacy of the Federal Government. That was refused. It was proposed to make the Senate the judge of difficulties that might arise between States and the General Government. That was refused. It was finally proposed to give Congress a negative on State legislation interfering with the powers of the Federal Government. That was refused. At last, at the very last moment, it was proposed to give that power to Congress by a vote of two thirds of each branch; and that, too, was denied.

Now, sir, I wish to show, with some little detail—as briefly as I possibly can and do justice to the subject—what was said by the leading members of the convention on these propositions to subject the States, in their political action, to any power of the General Government, whether of Congress, of the judiciary, or of the Executive, and by any majorities whatever. The first proposition was made by Mr. Ralldolph, on the 29th of May, 1787; and it was, that power should be given to Congress—

“To negative all laws passed by the several States contravening in the opinion of the National Legislature, the articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.”

To negative all laws violative of the articles of Union, and to employ force to constrain a State to perform its duty. Mr. Pinckney’s proposition on the same day was:

“And to render these prohibitions effectual, the Legislature of the United States shall have the power to revise the laws of the several States that may be supposed to infringe the powers exclusively delegated by this Constitution to Congress, and to negative and annul such as do.”

The proposition giving a power to negative the laws of the States, passed at first hurriedly, without consideration; but upon further examination, full justice was done to it. Upon the subject of force, Mr. Madison said, moving to postpone the proposition to authorize force:

“Mr. Madison observed, that the more he reflected on the use of force, the more he doubted the practicability, the justice, and the efficacy of it, when applied to people collectively, and not individually. A union of the States containing such an ingredient, seemed to provide for its own destruction. The use of force against a State would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed as might render this resource

unnecessary, and moved that the clause be postponed."—*Madison Papers—Debates in the Federal Convention*, vol. 5, p. 140.

Mr. Mason, the ancestor of our own distinguished colleague from Virginia, said:

"The most jarring elements of nature, fire and water, themselves, are not more incompatible than such a mixture of civil liberty and military execution. Will the militia march from one State into another in order to collect the arrears of taxes from the delinquent members of the Republic? Will they maintain an army for this purpose? Will not the citizens of the invaded State assist one another, till they rise as one man, and shake off the Union altogether? Rebellion is the only case in which the military force of the State can be properly exerted against its citizens. In one point of view, he was struck with horror at the prospect of recurring to this expedient. To punish the non-payment of taxes with death was a severity not yet adopted by despotism itself; yet this unexampled cruelty would be mercy compared to a military collection of revenue, in which the bayonet could make no discrimination between the innocent and the guilty. He took this occasion to repeat, that, notwithstanding his solicitude to establish a national Government, he never would agree to abolish the State governments, or render them absolutely insignificant. They were as necessary as the general Government, and he would be equally careful to preserve them."—*Madison Papers—Debates in the Federal Convention*, vol. 5, p. 217.

Mr. Ellsworth, upon the same subject, said:

"Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary: we all see and feel this necessity. The only question is, shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the States one against the other. I am for coercion by law—that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, States, in their political capacity. No coercion is applicable to such bodies; but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent State, it would involve the good and bad, the innocent and guilty, in the same calamity."—*Elliot's Debates*, vol. 2, p. 197.

Alexander Hamilton said:

"It has been observed, to coerce the States is one of the maddest projects that was ever devised. A failure of compliance will never be confined to a single State. This being the case, can we suppose it wise to hazard a civil war? Suppose Massachusetts, or any large State, should refuse, and Congress should attempt to compel them, would they not have influence to procure assistance, especially from those States which are in the same situation as themselves? What picture does this idea present to our view? A complying State at war with a non-complying State; Congress marching the troops of one State into the bosom of another; this State collecting auxiliaries, and forming, perhaps, a majority against its Federal head. Here is a nation at war with itself. Can any reasonable man be well disposed toward a Government which makes war and carnage the only means of supporting itself—a Government that can

exist only by the sword? Every such war must involve the innocent with the guilty. This single consideration should be sufficient to dispose every peaceable citizen against such a Government.”—*Elliot's Debates*, vol. 2, p. 233.

But, sir, strong as these gentlemen were against giving the power to exert armed force against the States, some of the best and ablest members of the convention were in favor of giving Congress control over State action by a negative. Mr. Madison himself was strongly in favor of that; and if that power had been granted, the first of the personal liberty bills that were passed would have been the last, for Congress would at once have annulled it, and the other States would have taken warning by that example. Mr. Pinckney's proposition was brought up, that “the national Legislature should have authority to negative all laws which they should judge to be improper.” He urged it strongly. Mr. Madison said:

“A negative was the mildest expedient that could be devised for preventing these mischiefs. The existence of such a check would prevent attempts to commit them. Should no such precaution be engrafted, the only remedy would be in an appeal to coercion. Was such a remedy eligible? Was it practicable? Could the national resources, if exerted to the utmost, enforce a national decree against Massachusetts, abetted, perhaps, by several of her neighbors? It would not be possible. A small proportion of the community, in a compact situation, acting on the defensive, and at one of its extremities, might at any time bid defiance to the national authority. Any government for the United States, formed on the supposed practicability of using force against the unconstitutional proceedings of the States, would prove as visionary and fallacious as the government of Congress.—*Debates of Convention, Madison Papers*, vol. 5, p. 171.

That is, of the Congress of the Confederation. Well, sir, Mr. Butler said to that, he was “vehement against the negative in the proposed extent as cutting off all hope of equal justice to the distant States. The people there would not, he was sure, give it a hearing;” and on the vote, Mr. Madison, aided by Mr. Pinckney, got but three States for it, and of these three States one was Virginia, and he got Virginia only by a vote of three to two, General Washington in the chair not voting. The proposition, therefore, was directly put down, but it was not killed forever. On the 17th of July it was renewed, and Mr. Madison again urged the convention to give some power to the Federal Government over State action:

“Mr. Madison considered the negative on the laws of the States as essential to the efficacy and security of the General Government. The necessity of a General Government proceeds from the propensity of the States to pursue their particular interests, in opposition to the general interest. This propensity will continue to disturb the system unless effectually controlled. Nothing short of a negative on their laws will control it. They will pass laws which will accomplish their injurious objects before they can be repealed by the General Legislature, or set aside by the national tribunals.” . . . “A power of negating the improper laws of the States is at once the most mild and certain means of preserving the harmony of the system. Its utility is sufficiently displayed in the British system,” &c.

This was again negatived in July by the same vote. Finally, on the 23d of August, for the last time, an attempt was made to give that negative with a check upon it; and it was in these words:

"Mr. Charles Pinckney moved to add, as an additional power to be vested in the Legislature of the United States:

"To negative all laws passed by the several States, interfering, in the opinion of the Legislature, with the general interests and harmony of the Union, provided that two thirds of the members of each House assent to the same."

Mr. Madison wanted it committed. Mr. Rutledge said:

"If nothing else, this alone would damn, and ought to damn the Constitution. Will any State ever agree to be bound hand and foot in this manner? It is worse than making mere corporations of them, whose by-laws would not be subject to this shackle."

And thereupon Mr. Pinckney withdrew his proposition, and all control was abandoned. There was then to be no control on the part of the General Government over State legislation, otherwise than in the action of the Federal judiciary upon such pecuniary controversies as might be properly brought before them.

Notwithstanding all this jealousy, when this Constitution came to be discussed in the conventions of the States, it met formidable opposition, upon the ground that the States were not sufficiently secure. Its advocates by every possible means endeavored to quiet the alarms of the friends of State rights. Mr. Madison, in Virginia, against Patrick Henry; Mr. Hamilton and Chief Justice Jay, in New York, against the opponents there; in all the States, eminent men used every exertion in their power to induce the adoption of the Constitution. They failed, until they proposed to accompany their ratifications with amendments that should prevent its meaning from being perverted, and prevent it from being falsely construed; and in two of the States especially—the States of Virginia and New York, the ratification was preceded by a statement of what their opinion of its true meaning was, and a statement that, on that construction, and under that impression, they ratified it. Some of the members of the Convention were for asking for these amendments in advance of ratification; but they were told it was unnecessary. In the Virginia convention, Mr. Randolph, who was General Washington's Attorney General, and Judge Nicholas, both expressed the opinion that it was not necessary, and that the ratification would be conditional upon that construction. Mr. Randolph said:

"If it be not considered too early, as ratification has not yet been spoken of, I beg to speak of it. If I did believe, with the honorable gentleman, that all power not expressly retained was given up by the people, I would detest this Government.

"But I never thought so; nor do I now. If, in the ratification, we put words to this purpose, 'And that all authority not given is retained by the

people, and may be resumed when perverted to their oppression; and that no right can be canceled, abridged, or restrained, by the Congress, or any officer of the United States?—I say if we do this, I conceive that, as this style of ratification would manifest the principles on which Virginia adopted it, we should be at liberty to consider as a violation of the Constitution every exercise of a power not expressly delegated therein. I see no objection to this.”

And Mr. Nicholas said the same thing:

“Mr. Nicholas contended that the language of the proposed ratification would secure everything which gentlemen desired, as it declared that all powers vested in the Constitution were derived from the people, and might be resumed by them whensoever they should be perverted to their injury and oppression; and that every power not granted thereby remained at their will. No danger whatever could arise; for [says he] these expressions will become a part of the contract. The Constitution cannot be binding on Virginia but with these conditions. If thirteen individuals are about to make a contract, and one agrees to it, but at the same time declares that he understands its meaning, significance, and intent to be (what the words of the contract plainly and obviously denote) that it is not to be construed so as to impose any supplementary condition on him, and that he is to be exonerated from it whensoever any such imposition shall be attempted, I ask whether, in this case, these conditions on which he has assented to it would not be binding on the other twelve? In like manner these conditions will be binding on Congress. They can exercise no power that is not expressly granted them.”

So, sir, we find that not alone in these two conventions, but by the common action of the States, there was an important addition made to the Constitution by which it was expressly provided that it should not be construed to be a General Government over all the people, but that it was a Government of States, which delegated powers to the General Government. The language of the ninth and tenth amendments to the Constitution is susceptible of no other construction:

“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

“The powers not delegated to the United States.”

Gentlemen are fond of using the words “surrendered,” abandoned, given up. That is the constant language on the other side. The language of the amendment intended to fix the meaning of the Constitution says that these powers were not abandoned by the State, not surrendered, not given up, but “delegated,” and therefore subject to resumption:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Now, Mr. President, if we admit, as we must, that there are certain political rights guarantied to the States of this Union by the terms of the Constitution itself—rights political in their character, and not susceptible

of judicial decision—if any State is deprived of any of those rights, what is the remedy? for it is idle to talk to us at this day in a language which shall tell us we have rights and no remedies. For the purpose of illustrating the argument upon this subject, let us suppose a clear, palpable case of violation of the Constitution. Let us suppose that the State of South Carolina having sent two Senators to sit upon this floor, had been met by a resolution of the majority here that, according to her just weight in the Confederacy, one was enough, and that we had directed our Secretary to swear in but one, and to call but one name on our roll as the yeas and nays are called for voting. The Constitution says that each State shall be entitled to two Senators, and each Senator shall have one vote. What power is there to force the dominant majority to repair that wrong? Any court? Any tribunal? Has the Constitution provided any recourse whatever? Has it not remained designedly silent on the subject of that recourse? And yet, what man will stand up in this Senate and pretend that if, under these circumstances, the State of South Carolina had declared, “I entered into a Confederacy or a compact by which I was to have my rights guaranteed by the constant presence of two Senators upon your floor; you allow me but one; you refuse to repair the injustice; I withdraw;” what man would dare say that that was a violation of the Constitution on the part of South Carolina? Who would say that that was a revolutionary remedy? Who would deny the plain and palpable proposition that it was the exercise of a right inherent in her under the very principles of the Constitution, and necessarily so inherent for self-defense?

Why, sir, the North, if it has not a majority here to-day, will have it very soon. Suppose these gentlemen from the North with the majority think that it is no more than fair, inasmuch as we represent here States in which there are large numbers of slaves, that the northern States should have each three Senators: what are we to do? They swear them in. No court has the power of prohibition, of *mandamus* over this body in the exercise of its political powers. It is the exclusive judge of the elections, the qualifications, and the returns of its own members, a judge without appeal. Shall the whole fifteen southern States submit to that, and be told that they are guilty of revolutionary excess if they say, we will not remain with you on these terms; we never agreed to it? Is that revolution, or is it the exercise of clear constitutional right?

Suppose this violation occurs under circumstances where it does not appear so plain to you, but where it does appear equally plain to South Carolina: then you are again brought back to the irrevocable point, who is to decide? South Carolina says, “You forced me to the expenditure of my treasure, you forced me to the shedding of the blood of my people, by a majority vote, and with my aid you acquired territory; now I have a constitutional right to go into that territory with my property, and to be there secured by your laws against its loss.” You say, no, she has not. Now there is this to be said: that right is not put down in the Constitution in quite so clear terms as the right to have two Senators; but it is a right which she

asserts with the concurrent opinion of the entire South. It is a right which she asserts with the concurrent opinion of one third or two fifths of your own people interested in refusing it. It is a right that she asserts, at all events, if not in accordance with the decision—as you may say no decision was rendered—in accordance with the opinion expressed by the Supreme Court of the United States; but yet there is no tribunal for the assertion of that political right. Is she without a remedy under the Constitution? If not, then what tribunal? If none is provided, then natural law and the law of nations tell you that she and she alone, from the very necessity of the case, must be the judge of the infraction and of the mode and measure of redress.

This is no novel doctrine; but it is as old as the law of nations, coeval in our system with the foundation of the Constitution; clearly announced over and over again in our political history. A very valued friend from New York did me the favor to send me an extract, which he has written out, from an address delivered by John Quincy Adams before the New York Historical Society in 1839, at the jubilee of the Constitution. His language is this:

“Nations acknowledge no judge between them upon earth, and their Governments, from necessity, must, in their intercourse with each other, decide when the failure of one party to a contract to perform its obligations absolves the other from the reciprocal fulfillment of his own. But this last of earthly powers is not necessary to the freedom or independence of States, connected together by the immediate action of the people, of whom they consist. To the people alone is there reserved, as well the dissolving as the constituent power, and that power can be exercised by them only under the tie of conscience, binding them to the retributive justice of heaven.

“With these qualifications, we may admit the same right as vested in the people of every State in the Union, with reference to the General Government, which was exercised by the people of the United Colonies with reference to the supreme head of the British Empire, of which they formed a part; and, under these limitations, have the people of each State in the Union a right to secede from the confederated Union itself?

“Thus stands the RIGHT. But the indissoluble link of union between the people of the several States of this confederated nation is, after all, not in the *right*, but in the *heart*. If the day should ever come (may Heaven avert it!) when the affections of the people of these States shall be alienated from each other; when the fraternal spirit shall give way to cold indifference, or collisions of interest shall fester into hatred, the bands of political association will not long hold together parties no longer attracted by the magnetism of conciliated interests and kindly sympathies; and far better will it be for the people of the *disunited* States to part in friendship from each other, than to be held together by constraint. Then will be the time for reverting to the precedent, which occurred at the formation and adoption of the Constitution, to form again a more perfect Union, by dissolving that which could no longer bind, and to leave the separated parts to be reunited by the law of political gravitation, to the center.”

But, Mr. President, the President of the United States tells us that he does not admit this right to be constitutional; that it is revolutionary.

I have endeavored thus far to show that it results from the nature of the compact itself; that it must necessarily be one of those reserved powers which was not abandoned by it, and therefore grows out of the Constitution, and is not in violation of it. If I am asked how I will distinguish this from revolutionary abuse, the answer is prompt and easy. These States, parties to the compact, have a right to withdraw from it, by virtue of its own provisions, when those provisions are violated by the other parties to the compact, when either powers not granted are usurped, or rights are refused that are especially granted to the States. But, sir, there is a large class of powers granted by this Constitution, in the exercise of which a discretion is vested in the General Government, and, in the exercise of that discretion, these admitted powers might be so perverted and abused as to give cause of complaint, and finally, to give the right to revolution; for under those circumstances there would be no other remedy. Now, taking again the supposition of a dominant northern majority in both branches, and of a sectional President and Vice President, the Congress of the United States then, in the exercise of its admitted powers, and the President to back them, could spend the entire revenue of the Confederation in that section which had control, without violating the words or the letter of the Constitution; they could establish forts, light-houses, arsenals, magazines, and all public buildings of every character in the northern States alone, and utterly refuse any to the South. The President, with the aid of his sectional Senate, could appoint all officers of the Navy and of the Army, all the civil officers of the Government, all the judges, attorneys, and marshals, all collectors and revenue officers, all postmasters—the whole host of public officers he might, under the forms and powers vested by the Constitution, appoint exclusively from the northern States, and quarter them in the southern States, to eat out the substance of our people, and assume an insulting superiority over them. All that might be done in the exercise of admitted constitutional power; and it is just that train of evils, of outrages, of wrongs, of oppressions long continued, that the Declaration of Independence says a people preserves the inherent right of throwing off by destroying their government by revolution. I say, therefore, that I distinguish the rights of the States under the Constitution into two classes: one resulting from the nature of their bargain; if the bargain is broken by the sister States, to consider themselves freed from it on the ground of breach of compact; if the bargain be not broken, but the powers be perverted to their wrong and their oppression, then, whenever that wrong and oppression shall become sufficiently aggravated, the revolutionary right—the last inherent right of man to preserve freedom, property, and safety—arises, and must be exercised, for none other will meet the case.

But, Mr. President, suppose South Carolina to be altogether wrong in her opinion that this compact has been violated to her prejudice; and that she has, therefore, a right to withdraw; take that for granted: what then? You still have the same issue to meet face to face. You must permit her to withdraw in peace, or you must declare war. That is, you must coerce

the State itself, or you must permit her to depart in peace. There is nothing whatever that can render for an instant tenable the attempted distinction between coercing a State itself, and coercing all the individuals in the manner now proposed. Let me read a few lines upon that subject. First, Vattel, in speaking of States, and of their rights, and the rights of their citizens, uses this language;

“Every nation that governs itself, under what form soever, without dependence on any foreign Power, is a *sovereign State*. Its rights are naturally the same as those of any other State. Such are the moral persons who live together in a natural society, subject to the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent; that is, that it govern itself by its own authority and laws.”

Then, he speaks of those qualifications that may exist in relation to this sovereignty; and he says:

“Several sovereign and independent States may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect State. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent when he is obliged to fulfill engagements which he has voluntarily contracted.”—*Vattel's Law of Nations*, book 1, chap. 1.

Here, then, we see that, under the law of nations, the State of South Carolina is a sovereign State, independently of all considerations drawn from the language of the Constitution itself, and as such is entitled to be treated, and as such has a right to protect and shield her citizens from all the consequences of obedience to her acts. . . .

Now, Mr. President, I desire not to enter in any detail into the dreary catalogue of wrongs and outrages by which South Carolina defends her position; that she has withdrawn from this Union because she has a constitutional right to do so, by reason of prior violations of the compact by her sister States. . . .

. . . You, Senators of the Republican party, assert, and your people whom you represent assert, that under a just and fair interpretation of the Federal Constitution, it is right that you deny that our slaves, which directly and indirectly involve a value of more than four thousand million dollars, are property at all, or entitled to protection in Territories owned by the common Government. You assume the interpretation that it is right to encourage, by all possible means, directly and indirectly, the robbery of this property, and to legislate so as to render its recovery as difficult and dangerous as possible; that it is right and proper and justifiable, under the Constitution, to prevent our mere transit across a sister State, to

embark with our property on a lawful voyage, without being openly despoiled of it. You assert, and practice upon the assertion, that it is right to hold us up to the ban of mankind—in speech, writing, and print, with every possible appliance of publicity—as thieves, robbers, murderers, villains, and criminals of the blackest dye, because we continue to own property which we owned at the time that we all signed the compact; that it is right that we should be exposed to spend our treasure in the purchase, or shed our blood in the conquest, of foreign territory, with no right to enter it for settlement without leaving behind our most valuable property, under penalty of its confiscation. You practically interpret this instrument to me that it is eminently in accordance with the assurance that our tranquillity and welfare were to be preserved and promoted; that our sister States should combine to prevent our growth and development; that they should surround us with a cordon of hostile communities, for the express and avowed purpose of accumulating in dense masses, and within restricted limits, a population which you believe to be dangerous, and thereby force the sacrifice of property nearly sufficient in value to pay the public debt of every nation in Europe.

This is the construction of the instrument that was to preserve our security, promote our welfare, and which we only signed on your assurance that that was its object. You tell us that this is a fair construction—not all, some say one thing, some another; but you act, or your people do, upon this principle. You do not propose to enter into our States, you say, and what do we complain of? You do not pretend to enter into our States to kill or destroy our institutions by force. Oh, no! You imitate the faith of Rhadamistus: you propose simply to close us in an embrace that will suffocate us. You do not propose to fell the tree; you promised not. You merely propose to girdle it, that it dies. And then, when we tell you that we did not understand this bargain this way, that your acting upon it in this spirit releases us from the obligations that accompany it; that under no circumstances can we consent to live together under that interpretation, and say: “we will go from you; let us go in peace;” we are answered by your leading spokesmen: “Oh, no; you cannot do that; we have no objection to it personally, but we are bound by our oaths; if you attempt it, your people will be hanged for treason. We have examined this Constitution thoroughly; we have searched it out with a fair spirit, and we can find warrant in it for releasing ourselves from the obligation of giving you any of its benefits, but our oaths force us to tax you; we can dispense with everything else; but our consciences, we protest upon our souls, will be sorely worried if we do not take your money.” [Laughter.] That is the proposition of the honorable Senator from Ohio, in plain language. He can avoid everything else under the Constitution, in the way of secession; but how is he to get rid of the duty of taking our money he cannot see. [Laughter.]

Now, Senators, this picture is not placed before you with any idea that it will act upon any one of you, or change your views, or alter your con-

duct. All hope of that is gone. Our committee has reported this morning that no possible scheme of adjustment can be devised by them all combined. The day for the adjustment has passed. If you would give it now, you are too late.

And now, Senators, within a few weeks we part to meet as Senators in one common council chamber of the nation no more forever. We desire, we beseech you, let this parting be in peace. I conjure you to indulge in no vain delusion that duty or conscience, interest or honor, imposes upon you the necessity of invading our States or shedding the blood of our people. You have no possible justification for it. I trust it is in no craven spirit, and with no sacrifice of the honor or dignity of my own State, that I make this last appeal, but from far higher and holier motives. If, however, it shall prove vain, if you are resolved to pervert the Government framed by the fathers for the protection of our rights into an instrument for subjugating and enslaving us, then, appealing to the Supreme Judge of the universe for the rectitude of our intentions, we must meet the issue that you force upon us as best becomes freemen defending all that is dear to man.

What may be the fate of this horrible contest, no man can tell, none pretend to foresee; but this much I will say: the fortunes of war may be adverse to our arms; you may carry desolation into our peaceful land, and with torch and fire you may set our cities in flames; you may even emulate the atrocities of those who, in the war of the Revolution, hounded on the blood-thirsty savage to attack upon the defenseless frontier; you may, under the protection of your advancing armies, give shelter to the furious fanatics who desire, and profess to desire, nothing more than to add all the horrors of a servile insurrection to the calamities of civil war; you may do all this—and more, too, if more there be—but you never can subjugate us; you never can convert the free sons of the soil into vassals, paying tribute to your power; and you never, never can degrade them to the level of an inferior and servile race. Never! Never! [Loud applause in the galleries.]

[January 2, 1861]

. . . If the right of secession exists at all, under any circumstances, revolutionary or not, it is a State right. Now, the question whether it exists under the Constitution or not, can only be determined in one way: first, by examining what powers are prohibited to the States; and next, whether the powers not prohibited are reserved. This power is nowhere prohibited; and the tenth amendment declares that the powers not prohibited by the Constitution to the States are reserved to the States.

28. ABRAHAM LINCOLN'S VIEW

In his first Inaugural Address, delivered March 4, 1861, Abraham Lincoln made a clear statement of the Northern view of the union. Readers will notice that Lincoln uses the word "national" in some places where others have used "confederate" or "federal."

FELLOW-CITIZENS of the United States: In compliance with a custom as old as the government itself, I appear before you to address you briefly, and to take in your presence the oath prescribed by the Constitution of the United States to be taken by the President "before he enters on the execution of his office."

I do not consider it necessary at present for me to discuss those matters of administration about which there is no special anxiety or excitement.

Apprehension seems to exist among the people of the Southern States that by the accession of a Republican administration their property and their peace and personal security are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed and been open to their inspection. It is found in nearly all the published speeches of him who now addresses you. I do but quote from one of those speeches when I declare that "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." Those who nominated and elected me did so with full knowledge that I had made this and many similar declarations, and had never recanted them.

And, more than this, they placed in the platform for my acceptance, and as a law to themselves and to me, the clear and emphatic resolution which I now read:

Resolved, That the maintenance inviolate of the rights of the States, and especially, the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend, and we denounce the lawless invasion by armed force of the soil of any State or Territory, no matter under what pretext, as among the gravest of crimes.

I now reiterate these sentiments; and, in doing so, I only press upon the public attention the most conclusive evidence of which the case is susceptible, that the property, peace, and security of no section are to be in any wise endangered by the now incoming administration. I add, too, that all the protection which, consistently with the Constitution and the laws, can be given, will be cheerfully given to all the States when lawfully demanded, for whatever cause—as cheerfully to one section as to another.

There is much controversy about the delivering up of fugitives from service or labor. The clause I now read is as plainly written in the Constitution as any other of its provisions:

No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

It is scarcely questioned that this provision was intended by those who made it for the reclaiming of what we call fugitive slaves; and the intention

of the lawgiver is the law. All members of Congress swear their support to the whole Constitution—to this provision as much as to any other. To the proposition, then, that slaves whose cases come within the terms of this clause “shall be delivered up,” their oaths are unanimous. Now, if they would make the effort in good temper, could they not with nearly equal unanimity frame and pass a law by means of which to keep good that unanimous oath?

There is some difference of opinion whether this clause should be enforced by national or by State authority; but surely that difference is not a very material one. If the slave is to be surrendered, it can be of but little consequence to him or to others by which authority it is done. And should any one in any case be content that his oath shall go unkept on a merely unsubstantial controversy as to how it shall be kept?

Again, in any law upon this subject, ought not all the safeguards of liberty known in civilized and humane jurisprudence to be introduced, so that a free man be not, in any case, surrendered as a slave? And might it not be well at the same time to provide by law for the enforcement of that clause in the Constitution which guarantees that “the citizen of each State shall be entitled to all privileges and immunities of citizens in the several States”?

I take the official oath to-day with no mental reservations, and with no purpose to construe the Constitution or laws by any hypercritical rules. And while I do not choose now to specify particular acts of Congress as proper to be enforced, I do suggest that it will be much safer for all, both in official and private stations, to conform to and abide by all those acts which stand unrepealed, than to violate any of them, trusting to find impunity in having them held to be unconstitutional.

It is seventy-two years since the first inauguration of a President under our National Constitution. During that period fifteen different and greatly distinguished citizens have, in succession, administered the executive branch of the government. They have conducted it through many perils, and generally with great success. Yet, with all this scope of precedent, I now enter upon the same task for the brief constitutional term of four years under great and peculiar difficulty. A disruption of the Federal Union, heretofore only menaced, is now formidably attempted.

I hold that, in contemplation of universal law and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination.

Continue to execute all the express provisions of our National Constitution, and the Union will endure forever—it being impossible to destroy it except by some action not provided for in the instrument itself.

Again, if the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it? One party to

a contract may violate it—break it, so to speak ; but does it not require all to lawfully rescind it ?

Descending from these general principles, we find the proposition that, in legal contemplation the Union is perpetual confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed, in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured, and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And, finally, in 1787 one of the declared objects for ordaining and establishing the Constitution was "to form a more perfect Union."

But if the destruction of the Union by one or by a part only of the States be lawfully possible, the Union is less perfect than before the Constitution, having lost the vital element of perpetuity.

It follows from these views that no State upon its own mere motion can lawfully get out of the Union ; that resolves and ordinances to that effect are legally void ; and that acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances.

I therefore consider that, in view of the Constitution and the laws, the Union is unbroken ; and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part ; and I shall perform it so far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or in some authoritative manner direct the contrary. I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it will constitutionally defend and maintain itself.

In doing this there needs to be no bloodshed or violence ; and there shall be none, unless it be forced upon the national authority. The power confided to me will be used to hold, occupy, and possess the property and places belonging to the government, and to collect the duties and imposts ; but beyond what may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere. Where hostility to the United States, in any interior locality, shall be so great and universal as to prevent competent resident citizens from holding the Federal offices, there will be no attempt to force obnoxious strangers among the people for that object. While the strict legal right may exist in the government to enforce the exercise of these offices, the attempt to do so would be so irritating, and so nearly impracticable withal, that I deem it better to forego for the time the uses of such offices.

The mails, unless repelled, will continue to be furnished in all parts of the Union. So far as possible, the people everywhere shall have that sense of perfect security which is most favorable to calm thought and reflection. The course here indicated will be followed unless current events and experience shall show a modification or change to be proper, and in

every case and exigency my best discretion will be exercised according to circumstances actually existing, and with a view and a hope of a peaceful solution of the national troubles and the restoration of fraternal sympathies and affections.

That there are persons in one section or another who seek to destroy the Union at all events, and are glad of any pretext to do it, I will neither affirm nor deny; but if there be such, I need address no word to them. To those, however, who really love the Union may I not speak?

Before entering upon so grave a matter as the destruction of our national fabric, with all its benefits, its memories, and its hopes, would it not be wise to ascertain precisely why we do it? Will you hazard so desperate a step while there is any possibility that any portion of the ills you fly from have no real existence? Will you, while the certain ills you fly to are greater than all the real ones you fly from—will you risk the commission of so fearful a mistake?

All profess to be content in the Union if all constitutional rights can be maintained. Is it true, then, that any right, plainly written in the Constitution, has been denied? I think not. Happily the human mind is so constituted that no party can reach to the audacity of doing this. Think, if you can, of a single instance in which a plainly written provision of the Constitution has ever been denied. If by the mere force of numbers a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would if such a right were a vital one. But such is not our case. All the vital rights of minorities and of individuals are so plainly assured to them by affirmations and negations, guarantees and prohibitions, in the Constitution, that controversies never arise concerning them. But no organic law can ever be framed with a provision specifically applicable to every question which may occur in practical administration. No foresight can anticipate, nor any document of reasonable length contain, express provisions for all possible questions. Shall fugitives from labor be surrendered by national or by State authority? The Constitution does not expressly say. *May* Congress prohibit slavery in the Territories? The Constitution does not expressly say. *Must* Congress protect slavery in the Territories? The Constitution does not expressly say.

From questions of this class spring all our constitutional controversies, and we divide upon them into majorities and minorities. If the minority will not acquiesce, the majority must, or the government must cease. There is no other alternative; for continuing the government is acquiescence on one side or the other.

If a minority in such case will secede rather than acquiesce, they make a precedent which in turn will divide and ruin them; for a minority of their own will secede from them whenever a majority refuses to be controlled by such minority. For instance, why may not any portion of a new confederacy a year or two hence arbitrarily secede again, precisely as portions of the present Union now claim to secede from it? All who

cherish disunion sentiments are now being educated to the exact temper of doing this.

Is there such perfect identity of interests among the States to compose a new Union, as to produce harmony only, and prevent renewed secession?

Plainly, the central idea of secession is the essence of anarchy. A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some form is all that is left.

I do not forget the position, assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice.

At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

One section of our country believes slavery is right, and ought to be extended, while the other believes it is wrong, and ought not to be extended. This is the only substantial dispute. The fugitive-slave clause of the Constitution, and the law for the suppression of the foreign slave-trade, are each as well enforced, perhaps, as any law can ever be in a community where the moral sense of the people imperfectly supports the law itself. The great body of the people abide by the dry legal obligation in both cases, and a few break over in each. This, I think, cannot be perfectly cured; and it would be worse in both cases after the separation of the sections than before. The foreign slave-trade, now imperfectly suppressed, would be ultimately revived, without restriction, in one section, while fugitive slaves, now only partially surrendered, would not be surrendered at all by the other.

Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them. A husband and wife may be divorced, and go out of the presence and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face, and intercourse, either amicable or hostile, must continue between them. Is it possible, then, to make that intercourse more advantageous or more satisfactory after separation than before? Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens than laws can among friends? Suppose you go to war, you cannot fight always; and when, after much loss on both sides, and no gain on either, you cease fighting, the identical old questions as to terms of intercourse are again upon you.

This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it. I cannot be ignorant of the fact that many worthy and patriotic citizens are desirous of having the National Constitution amended. While I make no recommendation of amendments, I fully recognize the rightful authority of the people over the whole subject, to be exercised in either of the modes prescribed in the instrument itself; and I should, under existing circumstances, favor rather than oppose a fair opportunity being afforded the people to act upon it. I will venture to add that to me the convention mode seems preferable, in that it allows amendments to originate with the people themselves, instead of only permitting them to take or reject propositions originated by others not specially chosen for the purpose, and which might not be precisely such as they would wish to either accept or refuse. I understand a proposed amendment to the Constitution—which amendment, however, I have not seen—has passed Congress, to the effect that the Federal Government shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconstruction of what I have said, I depart from my purpose not to speak of particular amendments so far as to say that, holding such a provision to now be implied constitutional law, I have no objection to its being made express and irrevocable.

The chief magistrate derives all his authority from the people, and they have conferred none upon him to fix terms for the separation of the States. The people themselves can do this also if they choose; but the executive, as such, has nothing to do with it. His duty is to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor.

Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world? In our present differences is either party without faith of being in the right? If the Almighty Ruler of Nations, with his eternal truth and justice, be on your side of the North, or on yours of the South, that truth and that justice

will surely prevail by the judgment of this great tribunal of the American people.

By the frame of the government under which we live, this same people have wisely given their public servants but little power for mischief; and have, with equal wisdom, provided for the return of that little to their own hands at very short intervals. While the people retain their virtue and vigilance, no administration, by any extreme of wickedness or folly, can very seriously injure the government in the short space of four years.

My countrymen, one and all, think calmly and well upon this whole subject. Nothing valuable can be lost by taking time. If there be an object to hurry any of you in hot haste to a step which you would never take deliberately, that object will be frustrated by taking time; but no good object can be frustrated by it. Such of you as are now dissatisfied, still have the old Constitution unimpaired, and, on the sensitive point, the laws of your own framing under it; while the new administration will have no immediate power, if it would, to change either. If it were admitted that you who are dissatisfied hold the right side in the dispute, there still is no single good reason for precipitate action. Intelligence, patriotism, Christianity, and a firm reliance on Him who has never yet forsaken this favored land, are still competent to adjust in the best way all our present difficulty.

In your hands, my dissatisfied fellow-countrymen, and not in mine, is the momentous issue of civil war. The government will not assail you. You can have no conflict without being yourselves the aggressors. You have no oath registered in heaven to destroy the government, while I shall have the most solemn one to "preserve, protect, and defend it."

I am loath to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union when again touched, as surely they will be, by the better angels of our nature.

29. VIEW OF THE SUPREME COURT

The view of the Supreme Court of the United States—"an indestructible Union, composed of indestructible States"—is found in the following excerpt from the opinion of the court delivered by Mr. Chief Justice Chase in the case of *Texas v. White et al.*, 7 Wall. 700 (1868).

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and

received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

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VII

Intergovernmental Relations



30. NEW STATES ON EQUAL FOOTING WITH ORIGINAL STATES
Coyle v. Oklahoma
31. FEDERAL CONSTITUTION LIMITS STATE SOVEREIGNTY
Ableman v. Booth
32. POLICE POWER OF A STATE *versus* DELEGATED FEDERAL POWER
Morgan v. Virginia
33. FEDERAL EMPLOYEES SUBJECT TO STATE TAX
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34. STATE PROGRAM BOWS BEFORE "SUPERIOR POWER" OF CONGRESS
Oklahoma v. Guy F. Atkinson Co. et al.
35. FEDERAL GOVERNMENT MAY NOT FORCE EXTRADITION BY STATE GOVERNOR
Kentucky v. Dennison
36. "FULL FAITH AND CREDIT" DOES NOT DESTROY ORIGINAL STATE JURISDICTION
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UNDER the dual system of government provided by the Constitution of 1789, it was inevitable that many questions would arise not only as to the relationship of the several states to the central government, but also as to the relationships of the several states to each other. Rulings of the Supreme Court of the United States on some of the questions arising out of these intergovernmental relations are found in this chapter.

INTERGOVERNMENTAL RELATIONS



30. NEW STATES ON EQUAL FOOTING WITH ORIGINAL STATES

One of the outstanding features of government in the United States is the equal participation of new states, along with the original thirteen states, in the control of the central government. New states are not subordinate to or dependent upon the original states, as provinces were upon Rome, or colonies were upon European powers. As early as 1787, in the Ordinance for Government of the Northwest Territory (see reading no. 112, *infra*), enacted under the Articles of Confederation, plans were laid for admitting new states "on an equal footing with the original States, in all respects whatever." The application of this principle is seen in the case of *Coyle v. Smith, Secretary of State of the State of Oklahoma*, 221 U. S. 559 (1911), from the report of which the following reading is taken.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a writ of error to the Supreme Court of Oklahoma to review the judgment of that court upholding a legislative act of the State providing for the removal of its capital from Guthrie to Oklahoma City, and making an appropriation from the funds of the State for the purpose of carrying out the act by the erection of the necessary state buildings. . . .

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The question reviewable under this writ of error, if any there be, arises under the claim set up by the petitioners, and decided against them, that the Oklahoma act of December 29, 1910, providing for the immediate location of the capital of the State at Oklahoma City was void as repugnant to the Enabling Act of Congress of June 16, 1906, under which the State was admitted to the Union. 34 Stat. 267, c. 3335. The act referred to is entitled "An act to enable the people of Oklahoma and the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original States," etc. The same act provides for the admission of Arizona and New Mexico. The first twenty-two sections relate only to Oklahoma. The second section is lengthy and deals with the organization of a constitutional convention and concludes in these words: "The capital of said State shall temporarily be at the city of Guthrie, and shall not be changed therefrom previous to Anno Domini Nineteen Hundred and Thirteen, but said capital shall after said year be

located by the electors of said State at an election to be provided for by the legislature; provided, however, that the legislature of said State, except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capital purposes during said period ”

Other sections of the act require that the constitution of the proposed new State shall include many specific provisions concerning the framework of the government, and some which impose limitations upon the State as regards the Indians therein, and their reservations, in respect of traffic in liquor among the Indians or upon their reservations. The twenty-second and last section applicable to Oklahoma reads thus: “That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this act.”

The constitution as framed contains nothing as to the location of the State capital; but the convention which framed it adopted a separate ordinance in these words:

“SEC. 497. Enabling Act accepted by Ordinance Irrevocable. Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of Congress of the United States, entitled ‘An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States; and to Enable the People of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States,’ approved June the sixteenth, Anno Domini, Nineteen Hundred and Six.”

This was submitted along with the constitution as a separate matter and was ratified as was the constitution proper.

The efficacy of this ordinance as a law of the State conflicting with the removal act of 1910 was, of course, a state question. The only question for review by us is whether the provision of the enabling act was a valid limitation upon the power of the State after its admission, which overrides any subsequent state legislation repugnant thereto.

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a State of any power which it *possesses*, it may, as a condition to the admission of a new State, constitutionally restrict its authority, to the extent at least, of

suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new States to this Union, and the constitutional duty of guaranteeing to "every State in this Union a republican form of government." The position of counsel for the appellants is substantially this: That the power of Congress to admit new States and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and, therefore, not admitted upon "an equal footing with the original States."

The power of Congress in respect to the admission of new States is found in the third section of the fourth Article of the Constitution. That provision is that, "new States may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States, or parts of States, without the consent of such States, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit States."

The definition of "a State" is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union. The first two States admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the State is admitted "as a new and *entire member* of the United States of America." 1 Stat. 189, 191. Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission in 1796 of Tennessee, as the third new State, it being declared to be "one of the United States of America," "on an equal footing with the original States in all respects whatsoever," phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted "on an equal footing with the original States."

The power is to admit "new States into *this* Union."

"This Union" was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution,

with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.

The argument that Congress derives from the duty of "guaranteeing to each State in this Union a republican form of government," power to impose restrictions upon a new State which deprives it of equality with other members of the Union, has no merit. It may imply the duty of such new State to provide itself with such state government, and impose upon Congress the duty of seeing that such form is not changed to one anti-republican,—*Minor v. Happersett*, 21 Wall. 162, 174, 175,—but it obviously does not confer power to admit a new State which shall be any less a State than those which compose the Union.

We come now to the question as to whether there is anything in the decisions of this court which sanctions the claim that Congress may by the imposition of conditions in an enabling act deprive a new State of any of those attributes essential to its equality in dignity and power with other States. In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the State; second, between compacts or affirmative legislation intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new States in respect of matters which would otherwise be exclusively within the sphere of state power.

As to requirements in such enabling acts as relate only to the contents of the constitution for the proposed new State, little need to be said. The constitutional provision concerning the admission of new States is not a mandate, but a power to be exercised with discretion. From this alone it would follow that Congress may require, under penalty of denying admission, that the organic laws of a new State at the time of admission shall be such as to meet its approval. A constitution thus supervised by Congress would, after all, be a constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an act of Congress.

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Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot.

In *Texas v. White*, 7 Wall. 700, 725, Chief Justice Chase said in strong and memorable language that, "the Constitution, in all of its provisions looks to an indestructible Union, composed of indestructible States."

In *Lane County v. Oregon*, 7 Wall. 76, he said:

"The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States."

To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

Judgment affirmed.

MR. JUSTICE McKENNA and MR. JUSTICE HOLMES dissent.

31. FEDERAL CONSTITUTION LIMITS STATE SOVEREIGNTY

The people of the United States have set up two types of governmental agencies: (1) federal and (2) state. The federal government is supreme in those spheres of governmental activity delegated to the central government by the Constitution of 1789. The supremacy of the federal government in the exercise of the delegated powers is illustrated in the cases of *Stephen V. R. Ableman, Plaintiff in Error, v. Sherman M. Booth*; and *The United States, Plaintiff in Error, v. Sherman M. Booth*, 21 Howard 506 (1858). The following reading is taken from the opinion of the court in those cases, delivered by Mr. Chief Justice Taney.

It will be seen, from the foregoing statement of facts, that a judge of the Supreme Court of the State of Wisconsin in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offence against the laws of this Government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the Supreme Court of the State.

In the second case, the State court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the District Court.

And it further appears that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision

is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the State court.

These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State.

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of *habeas corpus*. But the paramount power of the State court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of *habeas corpus*, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the States, no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned; for, if the Supreme Court of Wisconsin possessed the power it has exercised in relation to offences against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offences against our revenue laws, or any other law intended to guard the different departments of the General Government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its

laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found.

The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned.

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32. POLICE POWER OF A STATE *versus* DELEGATED FEDERAL POWER

In the following reading is an illustration of the way in which state legislation has been declared invalid as a burden on interstate commerce. This reading is taken from the opinion of the Supreme Court of the United States in the case of *Morgan v. Virginia*, 328 U.S. 373 (1946).

Mr. Justice REED delivered the opinion of the Court.

This appeal brings to this Court the question of the constitutionality of an act of Virginia, which requires all passenger motor vehicle carriers, both interstate and intrastate, to separate without discrimination the white and colored passengers in their motor buses so that contiguous seats will not be occupied by persons of different races at the same time. A violation of the requirement of separation by the carrier is a misdemeanor. The driver or other person in charge is directed and required to increase

or decrease the space allotted to the respective races as may be necessary or proper and may require passengers to change their seats to comply with the allocation. The operator's failure to enforce the provisions is made a misdemeanor.

These regulations were applied to an interstate passenger, this appellant, on a motor vehicle then making an interstate run or trip. According to the statement of fact by the Supreme Court of Appeals of Virginia, appellant, who is a Negro, was traveling on a motor common carrier, operating under the above-mentioned statute, from Gloucester County, Virginia, through the District of Columbia, to Baltimore, Maryland, the destination of the bus. There were other passengers, both white and colored. On her refusal to accede to a request of the driver to move to a back seat, which was partly occupied by other colored passengers, so as to permit the seat that she vacated to be used by white passengers, a warrant was obtained and appellant was arrested, tried and convicted of a violation of § 4097 dd of the Virginia Code. . . .

The errors of the Court of Appeals that are assigned and relied upon by appellant are in form only two. The first is that the decision is repugnant to Clause 3, § 8, Article I of the Constitution of the United States, and the second the holding that powers reserved to the states by the Tenth Amendment include the power to require an interstate motor passenger to occupy a seat restricted for the use of his race. Actually, the first question alone needs consideration for, if the statute unlawfully burdens interstate commerce, the reserved powers of the state will not validate it.

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This Court frequently must determine the validity of state statutes that are attacked as unconstitutional interferences with the national power over interstate commerce. This appeal presents that question as to a statute that compels racial segregation of interstate passengers in vehicles moving interstate.

The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation. Too true it is that the principle lacks in precision. Although the quality of such a principle is abstract, its application to the facts of a situation created by the attempted enforcement of a statute brings about a specific determination as to whether or not the statute in question is a burden on commerce. Within the broad limits of the principle, the cases turn on their own facts.

In the field of transportation, there has been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce. Because the Constitution puts the ultimate power to regulate commerce in Congress, rather than the states, the degree of state legislation's interference with that commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional. The courts could not invalidate federal legislation for the same reason because Congress, within the limits of the Fifth Amendment, has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end.

This statute is attacked on the ground that it imposes undue burdens on interstate commerce. It is said by the Court of Appeals to have been passed in the exercise of the state's police power to avoid friction between the races. But this Court pointed out years ago "that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power." Burdens upon commerce are those actions of a state which directly "impair the usefulness of its facilities for such traffic." That impairment, we think, may arise from other causes than costs or long delays. A burden may arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than national requirements.

On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made "at any time" during the journey when "necessary or proper for the comfort and convenience of passengers." This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, "any passenger to change his or her seat as it may be necessary or proper." An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey.

Interstate passengers traveling via motor buses between the north and south or the east and west may pass through Virginia on through lines in the day or in the night. The large buses approach the comfort of pullmans and have seats convenient for rest. On such interstate journeys the enforcement of the requirements for reseating would be disturbing.

Appellant's argument, properly we think, includes facts bearing on interstate motor transportation beyond those immediately involved in this journey under the Virginia statutory regulations. To appraise the weight of the burden of the Virginia statute on interstate commerce, related statutes of other states are important to show whether there are cumula-

tive effects which may make local regulation impracticable. Eighteen states, it appears, prohibit racial separation on public carriers. Ten require separation on motor carriers. Of these, Alabama applies specifically to interstate passengers with an exception for interstate passengers with through tickets from states without laws on separation of passengers. The language of the other acts, like this Virginia statute before the Court of Appeals' decision in this case, may be said to be susceptible to an interpretation that they do or do not apply to interstate passengers.

In states where separation of races is required in motor vehicles, a method of identification as white or colored must be employed. This may be done by definition. Any ascertainable Negro blood identifies a person as colored for purposes of separation in some states. In the other states which require the separation of the races in motor carriers, apparently no definition generally applicable or made for the purposes of the statute is given. Court definition or further legislative enactments would be required to clarify the line between the races. Obviously there may be changes by legislation in the definition.

The interferences to interstate commerce which arise from state regulation of racial association on interstate vehicles has long been recognized. Such regulation hampers freedom of choice in selecting accommodations. The recent changes in transportation brought about by the coming of automobiles does not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. The factual situation set out in preceding paragraphs emphasizes the soundness of this Court's early conclusion in *Hall v. De Cuir*, 95 U. S. 485.

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In weighing the factors that enter into our conclusion as to whether this statute so burdens interstate commerce or so infringes the requirements of national uniformity as to be invalid, we are mindful of the fact that conditions vary between northern or western states such as Maine or Montana, with practically no colored population; industrial states such as Illinois, Ohio, New Jersey and Pennsylvania with a small, although appreciable, percentage of colored citizens; and the states of the deep south with percentages of from twenty-five to nearly fifty per cent colored, all with varying densities of the white and colored races in certain localities. Local efforts to promote amicable relations in difficult areas by legislative segregation in interstate transportation emerge from the latter racial distribution. As no state law can reach beyond its own border nor bar transportation of passengers across its boundaries, diverse seating requirements for the races in interstate journeys result. As there is no federal act dealing with the separation of races in interstate transportation, we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations

for interstate travel. It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid.

Reversed.

33. FEDERAL EMPLOYEES SUBJECT TO STATE TAX

For many years employees of the federal government were considered exempt from state income taxes and employees of state governments were not required to pay federal income taxes. The following reading shows how a re-consideration of the fundamental question of federal-state relations resulted in making federal employees liable for non-discriminatory state taxes. This reading is taken from the case of *Graves et al., Commissioners Constituting the State Tax Commission of New York v. New York ex rel. O'Keefe*, 306 U. S. 466 (1939).

MR. JUSTICE STONE delivered the opinion of the Court.

We are asked to decide whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden upon the federal government.

Respondent, a resident of New York, was employed during 1934 as an examining attorney for the Home Owners' Loan Corporation at an annual salary of \$2,400. In his income tax return for that year he included his salary as subject to the New York state income tax imposed by Art. 16 of the Tax Law of New York (Consol. Laws, c. 60). Subdivision 2f of § 359, since repealed, exempted from the tax "Salaries, wages and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States. . . ." Petitioners, New York State Tax Commissioners, rejected respondent's claim for a refund of the tax based on the ground that his salary was constitutionally exempt from state taxation because the Home Owners' Loan Corporation is an instrumentality of the United States Government and that he, during the taxable year, was an employee of the federal government engaged in the performance of a governmental function.

On review by certiorari the Board's action was set aside by the Appellate Division of the Supreme Court of New York, 253 App. Div. 91; 1 N. Y. S. 2d 195, whose order was affirmed by the Court of Appeals. 278 N. Y. 691; 16 N. E. 2d 404. Both courts held respondent's salary was free from tax on the authority of *New York ex rel. Rogers v. Graves*, 299 U. S. 401, which sustained the claim that New York could not constitutionally tax the salary of an employee of the Panama Rail Road Company, a wholly-owned corporate instrumentality of the United States. . . .

The Home Owners' Loan Corporation was created pursuant to § 4 (a) of the Home Owners' Loan Act of 1933, 48 Stat. 128, 12 U. S. C. § 1461 *et seq.*, which was enacted to provide emergency relief to home owners,

particularly to assist them with respect to home mortgage indebtedness. The corporation, which is authorized to lend money to home owners on mortgages and to refinance home mortgage loans within the purview of the Act, is declared by § 4 (a) to be an instrumentality of the United States. Its shares of stock are wholly government-owned. § 4 (b). Its funds are deposited in the Treasury of the United States, and the compensation of its employees is paid by drafts upon the Treasury.

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the federal government. Cf. *Kay v. United States*, 303 U. S. 1. As that government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. *McCulloch v. Maryland*, 4 Wheat. 316, 432; *Van Brocklin v. Tennessee*, 117 U. S. 151, 158-159; *South Carolina v. United States*, 199 U. S. 437, 451-452; *Helvering v. Gerhardt*, 304 U. S. 405, 412-415. And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. . . .

The single question with which we are now concerned is whether the tax laid by the state upon the salary of respondent, employed by a corporate instrumentality of the federal government, imposes an unconstitutional burden upon that government. The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning, *McCulloch v. Maryland*, *supra*, 435-436, and possible differences in application, deriving from differences in the source, nature and extent of the immunity of the governments and their agencies, were pointed out and discussed by this Court in detail during the last term. *Helvering v. Gerhardt*, *supra*, 412-413, 416.

So far as now relevant, those differences have been thought to be traceable to the fact that the federal government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of federal agencies from state taxation. . . .

Congress has declared in § 4 of the Act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from federal and state taxation, except surtaxes, estate, inheritance and gift taxes. The corporation itself, "including its franchise, its capital, reserves and surplus, and its loans and income," is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from state taxation of the salary of the corporation's employees, and the Congressional intention is not to be gathered from the statute by implication. . . .

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the Congressional purpose. The nature and extent of that implication depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The present tax is a non-discriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their funds. It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, . . . and the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interfer-

ence by one government with the other in the performance of its functions.

In the four cases in which this Court has held that the salary of an officer or employee of one government or its instrumentality was immune from taxation by the other, it was assumed, without discussion, that the immunity of a government or its instrumentality extends to the salaries of its officers and employees. This assumption made with respect to the salary of a governmental officer in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, and in *Collector v. Day*, 11 Wall. 113, was later extended to confer immunity on income derived by a lessee from lands leased to him by a government in the performance of a governmental function, *Gillespie v. Oklahoma*, 257 U.S. 501; *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, and cases cited, although the claim of a like exemption from tax on the income of a contractor engaged in carrying out a governmental project was rejected both in the case of a contractor with a state, *Metcalf & Eddy v. Mitchell*, *supra*, and of a contractor with the national government, *James v. Dravo Contracting Co.*, *supra*.

The ultimate repudiation in *Helvering v. Mountain Producers Corp.*, *supra*, of the doctrine that a tax on the income of a lessee derived from a lease of government owned or controlled lands is a forbidden interference with the activities of the government concerned led to the re-examination by this Court, in the *Gerhardt* case, of the theory underlying the asserted immunity from taxation by one government of salaries of employees of the other. It was there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. See *Metcalf & Eddy v. Mitchell*, *supra*, 523-524; *James v. Dravo Contracting Co.*, *supra*, 156-158. It was further pointed out that, as applied to the taxation of salaries of the employees of one government, the purpose of the immunity was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens of the other.

In applying these controlling principles in the *Gerhardt* case the Court held that the salaries of employees of the New York Port Authority, a state instrumentality created by New York and New Jersey, were not immune from federal income tax, even though the Authority be regarded as not subject to federal taxation. It was said that the taxpayers enjoyed

the benefit and protection of the laws of the United States and were under a duty, common to all citizens, to contribute financial support to the government; that the tax laid on their salaries and paid by them could be said to affect or burden their employer, the Port Authority, or the states creating it, only so far as the burden of the tax was economically passed on to the employer; that a non-discriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which New York and New Jersey had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials. The Court concluded that the claimed immunity would do no more than relieve the taxpayers from the duty of financial support to the national government in order to secure to the state a theoretical advantage, speculative in character and measurement and too unsubstantial to form the basis of an implied constitutional immunity from taxation.

The conclusion reached in the *Gerhardt* case that in terms of constitutional tax immunity a federal income tax on the salary of an employee is not a prohibited burden on the employer makes it imperative that we should consider anew the immunity here claimed for the salary of an employee of a federal instrumentality. As already indicated, such differences as there may be between the implied tax immunity of a state and the corresponding immunity of the national government and its instrumentalities may be traced to the fact that the national government is one of delegated powers, in the exercise of which it is supreme. Whatever scope this may give to the national government to claim immunity from state taxation of all instrumentalities which it may constitutionally create, and whatever authority Congress may possess as incidental to the exercise of its delegated powers to grant or withhold immunity from state taxation, Congress has not sought in this case to exercise such power. Hence these distinctions between the two types of immunity cannot affect the question with which we are now concerned. The burden on government of a non-discriminatory income tax applied to the salary of the employee of a government or its instrumentality is the same, whether a state or national government is concerned. The determination in the *Gerhardt* case that the federal income tax imposed on the employees of the Port Authority was not a burden on the Port Authority made it unnecessary to consider whether the Authority itself was immune from federal taxation; the claimed immunity failed because even if the Port Authority were itself immune from federal income tax, the tax upon the income of its employees cast upon it no unconstitutional burden.

Assuming, as we do, that the Home Owners' Loan Corporation is clothed with the same immunity from state taxation as the government itself, we cannot say that the present tax on the income of its employees lays any unconstitutional burden upon it. All the reasons for refusing to imply a constitutional prohibition of federal income taxation of salaries of

state employees, stated at length in the *Gerhardt* case, are of equal force when immunity is claimed from state income tax on salaries paid by the national government or its agencies. In this respect we perceive no basis for a difference in result whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employee or an officer of either a state or the national government, or of its instrumentalities. In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in *Collector v. Day*, *supra*, and in *New York ex rel. Rogers v. Graves*, *supra*, is contrary to the reasoning and to the conclusions reached in the *Gerhardt* case and in *Metcalf & Eddy v. Mitchell*, *supra*; . . . In their light the assumption can no longer be made. *Collector v. Day*, *supra*, and *New York ex rel. Rogers v. Graves*, *supra*, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities.

So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

Reversed.

34. STATE PROGRAM BOWS BEFORE "SUPERIOR POWER" OF CONGRESS

The extent to which the federal government is able to go in the exercise of a delegated power, even though state property and state programs are involved, is illustrated in the following reading from the report of the case of *Oklahoma ex rel. Phillips, Governor, v. Guy F. Atkinson Co. et al.*, 313 U. S. 508 (1941).

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves primarily the constitutionality of the Act of June 28, 1938 (52 Stat. 1215) insofar as it authorizes the construction of the Denison Reservoir on Red River in Texas and Oklahoma.

The bill in equity was filed by the State of Oklahoma seeking to enjoin the construction of any dam across Red River within the domain of Oklahoma which would impound the waters of the Red River (or its tributary, Washita River) so as to inundate and destroy any of the lands, highways or bridges belonging to or under the jurisdiction and control of the state, or which would obliterate or interfere with its boundaries. The bill also seeks to restrain the institution or conduct in any court in Oklahoma of proceedings to condemn lands for the purpose of the dam or reservoir.

The bill alleges that Oklahoma will be injured in the following manner by construction of the project: The greater part of the dam will rest on Oklahoma soil and will form a reservoir inundating about 150,000 acres of land, of which 100,000 acres are located in Oklahoma. Of those acres about 3,800 are owned by the state. The United States will acquire title to the inundated land. The land owned by the state is used for school purposes, for a prison farm, for highways, rights of way, and bridges. The basin to be inundated is inhabited by about 8,000 Oklahoma citizens. Much of the land is rich soil in a high state of cultivation. Much of it has large potential oil reserves. On some of it there are large producing oil wells and on other parts there are drilling operations and exploration for oil and gas. At least 15,000 acres will be highly productive oil lands and at least 50,000 acres are underlaid with oil and gas. There are thirty-nine school districts and townships in the four counties in which the affected area is located. Those governmental units are largely supported by *ad valorem* taxes. The taking of the 100,000 acres will decrease the taxable property in each of the counties and take virtually all of the taxable property in many of the townships and school districts. Each of these governmental units has a large bonded indebtedness payable from an annual levy of taxes. Inundation of the land will deprive those units of much of the tax revenue, so that many will be practically destroyed and the remainder seriously hampered. Since the state derives much of its revenue from a gross production tax on oil and gas, it will suffer great losses in tax revenues from the inundation of the oil and gas lands. The "annual wealth production" to the citizens of Oklahoma from the lands in the reservoir basin is about \$1,500,000. Aside from such losses and losses from oil revenues and personal property taxation, the net taxable loss to the counties, townships and school districts will be about \$40,000 annually.

It is also alleged that the construction of the dam will be a "direct invasion and destruction" of the sovereign and proprietary rights of Oklahoma in that: the boundary of Oklahoma will be obliterated for approximately 40 miles (see *Oklahoma v. Texas*, 260 U. S. 606); there will be a "forcible reduction of the area of plaintiff as one of the United States"; lands owned by it will be taken; its highways and bridges will be destroyed causing an interruption in communication between various parts of the state; the waters to be impounded belong to Oklahoma but will be taken from it without payment of just compensation; those waters will be

diverted from Oklahoma and will be run through turbines located in Texas for the generation of power for sale principally in Texas; the removal of citizens from the 100,000 acres of land will create a "serious social and economic problem," the burden of which will fall on Oklahoma for which no compensation is afforded.

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Floods pay no respect to state lines. Their effective control in the Mississippi valley has become increasingly a subject of national concern, in recognition of the fact that single states are impotent to cope with them effectively. The methods of dealing with them have elicited a contrariety of views.

The idea of reservoir control on the tributaries of the Mississippi is not new. The Ellet report to the War Department in 1852 urged the making of surveys for the installation of reservoirs on the Red River and other tributaries which would serve the "double purpose" of "keeping back the floods" and relieving "summer navigation from obstruction, by allowing the surplus so retained, to pass down in the season of low water." The emergence in recent years of comprehensive plans for reservoirs in the Mississippi river basin marks the development of an integrated system designed not only to alleviate, ultimately, flood conditions on the Mississippi itself, but also to avoid or reduce local flood disasters. A part of the local benefits of flood control is frequently protection of navigation in the tributary itself. That is present here to a degree. It is true that "no part of the [Red] river within Oklahoma is navigable. . . . Though appellant alleged that the stream is not now a navigable river of the United States, it has heretofore been authoritatively determined that in years past "the usual head of navigation" was Lanesport, Arkansas, near the Oklahoma boundary. . . . At the present time, commerce on the Red River is limited to the section below Alexandria, Louisiana, 122 miles above its mouth. The fact that portions of a river are no longer used for commerce does not dilute the power of Congress over them. . . . And it is clear that Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions. . . . It is obvious that, at least incidentally, Congress has done precisely that in this case. Congress was not unmindful of the effect of this project on the navigable capacity of the river. In authorizing it, Congress exercised all the power it possessed to control navigable waters. The Acts in question contain a declaration that one of their purposes is to improve navigation. And the Report clearly shows that the Denison Reservoir will have at least an incidental effect in protecting or improving the navigability of portions of the Red River. . . .

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We would, however, be less than frank if we failed to recognize this project as part of a comprehensive flood-control program for the

Mississippi itself. But there is no constitutional reason why Congress or the courts should be blind to the engineering prospects of protecting the nation's arteries of commerce through control of the watersheds. There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river. We need no survey to know that the Mississippi is a navigable river. We need no survey to know that the tributaries are generous contributors to the floods of the Mississippi. And it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself. We have recently recognized that "Flood protection, watershed development, recovery of the cost of improvements through utilization of power are . . . parts of commerce control." *United States v. Appalachian Power Co.*, *supra*, p. 426. And we now add that the power of flood control extends to the tributaries of navigable streams. For, just as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries. As repeatedly recognized by this Court from *M'Culloch v. Maryland*, 4 Wheat. 316, to *United States v. Darby*, 312 U. S. 100, the exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce.

It is, of course, true that the extent to which this project will alleviate flood conditions in the lower Mississippi is somewhat conjectural. The District Engineer estimated that the Denison project would cause a reduction of 35,000 cubic feet per second in the lower Mississippi in case the May, 1908, flood were repeated; 8,000 cubic feet per second, in case of the May, 1935, flood; and 100,000 cubic feet per second, in case of the estimated maximum probable flood. But the Division Engineer pointed out that "the magnitude of the effect would depend upon the size and origin of the concurrent flood in Red River, and upon the basis of reservoir operation." In his view, a reduction in flow of 35,000 cubic feet per second in case of such a flood as 1908 "if long enough sustained, would imply a reduction in stage averaging 1.3 feet between Alexandria and Moncla, and a reduction of 0.15 foot in the flow lines of the Atchafalaya Basin and the main river below Old River, provided they were at peak stage. At lower stages the effect would be greater, but less necessary." This matter was again reviewed in the Definite Project and the following observations were made: "Floods in the Mississippi River usually occur in the spring as a result of flood flows out of the Ohio River. The coincidence of flood flows out of the Red River with the Mississippi River spring floods is rare. However, the early summer floods out of the Missouri River occasionally coincide in the Mississippi River with the summer floods out of the Red

River. The control provided by the proposed Denison Dam and Reservoir on the Red River summer floods has been estimated to produce a reduction of approximately 0.6 foot at the mouth of Old River on the Mississippi. This reduction, while not substantial with respect to Mississippi flood stages, is important when flood crests seriously tax the Mississippi levee system."

Such matters raise not constitutional issues but questions of policy. They relate to the wisdom, need, and effectiveness of a particular project. They are therefore questions for the Congress, not the courts. For us to inquire whether this reservoir will effect a substantial reduction in the lower Mississippi floods would be to exercise a legislative judgment based on a complexity of engineering data. It is for Congress alone to decide whether a particular project, by itself or as part of a more comprehensive scheme, will have such a beneficial effect on the arteries of interstate commerce as to warrant it. That determination is legislative in character. Cf. *United States v. Appalachian Power Co.*, *supra*, p. 424. The nature of the judgment involved is reëmphasized if this project is viewed not in isolation but as part of a comprehensive, integrated reservoir system in the Mississippi River basin. A War Department survey in 1935 reveals promising engineering prospects in a system of 157 reservoirs throughout the tributaries of the Mississippi. To say that no one of those projects could be constitutionally authorized because its separate effect on floods in the Mississippi would be too conjectural would be to deny the actual or potential aggregate benefits of the integrated system as a whole. That reveals the necessity, from the constitutional viewpoint, of leaving to Congress the decision as to what watersheds should be controlled (and what methods should be employed) in order to protect the various arteries of interstate commerce from the disasters of floods.

Nor is it for us to determine whether the resulting benefits to commerce as a result of this particular exercise by Congress of the commerce power outweigh the costs of the undertaking. *Arizona v. California*, 283 U. S. 423, 456-457; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 329-330. Nor may we inquire into the motives of members of Congress who voted for this project, in an endeavor to ascertain whether their concern over the great national loss from soil erosion, the enormous crop damages, the destruction of homes, the loss of life and other like ravages of floods, overshadowed in their minds the desirability of protecting the Mississippi and other arteries of commerce. *Arizona v. California*, *supra*, p. 455, and cases cited. It is sufficient for us that Congress has exercised its commerce power, though other purposes will also be served. *Id.*, p. 456.

But Oklahoma points out that the Denison Reservoir is a multiple-purpose project, combining functionally and physically separate and unrelated purposes. It says that only the top 40 feet of the dam is set apart for flood control and that the lower portions of the dam are designed for the power project and are neither useful nor necessary for flood control.

It points out from the Report that a reservoir for flood control only would have a maximum height of 165 feet, while a reservoir for flood control and power development would require a maximum height of 185 feet. It therefore earnestly contends that the additional 20 feet in height of the dam requires a very much greater acreage of appellant's domain than would a project for flood control only. And it insists that Congress is without authority to authorize a taking of Oklahoma's domain for the construction of the water power feature of the project.

There are several answers to these contentions. We are not concerned here with the question as to the authority of the federal government to establish on a non-navigable stream a power project which has no relation to, or is not a part of, a flood-control project. While this reservoir is a multiple-purpose project, it is basically one for flood control. There is no indication that but for flood control it would have been projected. It originated as part of a comprehensive program for flood control. And the recommendation in the Report that a dual purpose dam be constructed was based "on the assumption that the flood-control project is to be built in any event." . . . Furthermore, it is plain from the Report that the construction of the project so as to accommodate power will increase or augment some of the flood-control benefits, including river flow, which would accrue were the dam to be erected for flood control only. Thus, the District Engineer stated: "If it were constructed solely for flood control it would have beneficial effects in reducing floods, decreasing bank caving and silt carriage, and in substituting moderately high stages of long durations for high-flood stages of short duration. If the Denison Reservoir were constructed for the dual purposes of flood control and power development, these beneficent effects would be augmented by those resulting from the regulated power discharge which would increase low-water flows and furnish more dependable navigable stages especially in the upper portions of the navigation pools."

It is true that the power phase of this project in purpose and effect will carry some of the costs of flood control. The Division Engineer estimated that the annual deficit of \$287,000 from flood control would be offset by an annual profit of \$404,310 from power, leaving an annual net profit of \$117,000. But the fact that Congress has introduced power development into this project as a paying partner does not derogate from the authority of Congress to construct the dam for flood control, including river flow. The power project is not unrelated to those purposes. The allocations of cost and storage between power and flood control, however significant for some purposes, cannot conceal the flood-control realities of this total project. Cost of the power project, roughly speaking, was determined by the cost of the multiple-purpose dam less the cost of a dam for flood control only. On that basis the Report points out that the cost of storage for flood control only (5,800,000 acre-feet) is about \$6.60 per acre-foot, while the cost of the 3,500,000 acre-feet in the so-called power pool is around \$2 per acre-foot, exclusive of the cost of the powerhouse and appurtenant

construction. In this connection, the Definite Project states that the "amount of storage which can be economically allocated to the production of power depends on the ability of the power market to absorb the power during the useful life of the project." But the Division Engineer observed that "In actual operation of the dual-purpose project this cheap storage would be dedicated to flood control, whereas in the financial set-up it is credited to power." It is clear from the Report and the Definite Project, that the bottom pool of dead storage is designed to take care of the deposit of silt "which would otherwise reduce the efficiency and economic worth of the flood control storage." At the same time, it will effectively provide waterpower head. And so far as the power storage is concerned, the Definite Project makes plain that it is functionally related to the broad objectives of flood control. The operation of the reservoir will involve a consideration of its multiple purposes. Its operation in periods of drought so as to regularize the flow below the dam; the reduction in reservoir outflow in case of floods down the valley; the increase of the outflow, in case of impending floods from above the dam, to the maximum "bank full capacity downstream of the dam, so that the maximum amount of flood control storage will be available when the peak of the flood reaches the reservoir, thereby reducing the peak outflow of the reservoir to a minimum"—these are ample evidence that the power features and the flood-control features of the dam, including river flow, are not unrelated. They demonstrate that, in operation of the dam, the several functions will be interdependent, and that the conflicts between the respective requirements of flood control and power development are here more apparent than real. They show that this is nonetheless a flood-control project which will "fully control the maximum flood of record," though power, it is hoped, will pay the way. Whether the work of flood-control, including river flow, would be better done by a dam of one design or another is for Congress to determine. And, as we have said, the fact that ends other than flood control will also be served, or that flood control may be relatively of lesser importance, does not invalidate the exercise of the authority conferred on Congress. . . .

The Tenth Amendment does not deprive "the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States v. Darby, supra*, p. 124, and cases cited. Since the construction of this dam and reservoir is a valid exercise by Congress of its commerce power, there is no interference with the sovereignty of the state. *United States v. Appalachian Power Co., supra*, p. 428. The fact that land is owned by a state is no barrier to its condemnation by the United States. *Wayne County v. United States*, 53 Ct. Cls. 417, aff'd 252 U. S. 574. There is no complaint that any property owner will not receive just compensation for the land taken. The possible adverse effect on the tax revenues of Oklahoma as a result of the exercise by the Federal Government of its power of eminent domain is no barrier to the exercise of that power. "Whenever the con-

stitutional powers of the federal government and those of the state come into conflict, the latter must yield." *Florida v. Mellon*, 273 U. S. 12, 17. Nor can a state call a halt to the exercise of the eminent domain power of the federal government because the subsequent flooding of the land taken will obliterate its boundary. And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. *United States v. Rio Grande Dam & Irrigation Co.*, *supra*, p. 703; *New Jersey v. Sargent*, 269 U. S. 328, 337; *Arizona v. California*, 298 U. S. 558, 569; *United States v. Appalachian Power Co.*, *supra*.

Affirmed.

35. FEDERAL GOVERNMENT MAY NOT FORCE EXTRADITION BY STATE GOVERNOR

State officers are not mere administrative officers of the federal government. An illustration of this point is seen in the inability of the federal authorities to force a state governor to return a fugitive to the state from which he has escaped. The following reading is from the opinion of the court, delivered by Mr. Chief Justice Taney, in *Commonwealth of Kentucky v. Dennison, Governor*, etc., 24 Howard 66 (1860).

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the Governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the Executive authority of the State of Ohio.

The demand being thus made, the act of Congress declares, that "it shall be the duty of the Executive authority of the State" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Con-

stitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word "duty" in the law points to the obligation on the State to carry it into execution.

It is true that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution. And laws were passed authorizing State courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the State courts the same authority with the District Court of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of Congress. And these powers were for some years exercised by State tribunals, readily, and without objection, until in some of the States it was declined because it interfered with and retarded the performance of duties which properly belonged to them, as State courts; and in other States, doubts appear to have arisen as to the power of the courts, acting under the authority of the State, to inflict these penalties and forfeitures for offences against the General Government, unless especially authorized to do so by the State.

And in these cases the co-operation of the States was a matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution. And the acts of Congress conferring the

jurisdiction merely give the power to the State tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience.

But the language of the act of 1793 is very different. It does not purport to give authority to the State Executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the act of 1793.

And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him.

And upon this ground the motion for the mandamus must be overruled.

36. "FULL FAITH AND CREDIT" DOES NOT DESTROY ORIGINAL STATE JURISDICTION

Article IV, Section 1, of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." States assuming jurisdiction in judicial proceedings are not entitled to "full faith and credit" for a court decree unless the parties have in fact a "*bona fide* domicil in the State of the court purporting" to control the parties by the court decree. This is illustrated by the case of *Williams et al. v. North Carolina*, 325 U. S. 226 (1945) from which the following reading is taken.

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review judgments of the Supreme Court of North Carolina, affirming convictions for bigamous cohabitation, assailed on the ground that full faith and credit, as required by the Constitution of the

United States, was not accorded divorces decreed by one of the courts of Nevada. . . .

The scales of justice must not be unfairly weighted by a State when full faith and credit is claimed for a sister-State judgment. But North Carolina has not so dealt with the Nevada decrees. She has not raised unfair barriers to their recognition. North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence.

State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. . . . This record is barren of such attempted evasion. What it shows is that petitioners, long-time residents of North Carolina, came to Nevada, where they stayed in an auto-court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live. It cannot reasonably be claimed that one set of inferences rather than another regarding the acquisition by petitioners of new domicils in Nevada could not be drawn from the circumstances attending their Nevada divorces. It would be highly unreasonable to assert that a jury could not reasonably find that the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina. Such an intention, the trial court properly charged, would preclude acquisition of domicils in Nevada. . . . And so we can not say that North Carolina was not entitled to draw the inference that petitioners never abandoned their domicils in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court.

If a State cannot foreclose, on review here, all the other States by its finding that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a federal system in which regulation of domestic relations has been left with the States and not given to the national authority. But the occasional disregard by any one State of the reciprocal obligations of the forty-eight States to respect the constitutional power of each to deal with domestic relations of those domiciled within its borders is hardly an argument for allowing one State to deprive the other forty-seven States of their constitutional rights. Relevant statistics happily do not justify lurid forebodings that parents without number will disregard the fate of their offspring by being unmindful of the status of dignity to which they are entitled. But, in any event, to the extent that some one State may, for considerations of

its own, improperly intrude into domestic relations subject to the authority of the other States, it suffices to suggest that any such indifference by a State to the bond of the Union should be discouraged, not encouraged.

In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage. The petitioners therefore assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada. Since the divorces which they sought and received in Nevada had no legal validity in North Carolina and their North Carolina spouses were still alive, they subjected themselves to prosecution for bigamous cohabitation under North Carolina law. The legitimate finding of the North Carolina Supreme Court that the petitioners were not in truth domiciled in Nevada was not a contingency against which the petitioners were protected by anything in the Constitution of the United States. . . .



VIII

Citizenship: Civil Rights and Responsibilities



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THE question of citizenship was not clearly answered in the Constitution of 1789. Readings in this chapter will serve to introduce the student to some of the efforts made to solve the problem of citizenship, and may stimulate thought as to rights and responsibilities incident to citizenship.

CITIZENSHIP: CIVIL RIGHTS AND RESPONSIBILITIES



37. CITIZENSHIP BEFORE THE FOURTEENTH AMENDMENT

Prior to the Civil War there were divergent views as to citizenship in the United States. There was considerable difference between the States Right view and the Nationalist view. In 1866, Congress sought to give effect to the Nationalist view. The addition to the Constitution in 1868 of the Fourteenth Amendment definitely settled the question.

The excerpts below from the report of the case of *Dred Scott, Plaintiff in Error, v. John F. A. Sandford*, 19 Howard 393, will acquaint the reader with the principal points in the States Right view. The case was argued twice before the Supreme Court of the United States,—at the December term in 1855 and again at the December term in 1856. The decision of the court was finally announced in March 1857, two days after the inauguration of President Buchanan.

The counsel then filed the following agreed statement of facts, viz:

In the year 1834, the plaintiff was a negro slave belonging to Dr. Emerson, who was a surgeon in the army of the United States. In that year, 1834, said Dr. Emerson took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling, from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave at said Fort Snelling unto the

said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and said Harriet at said Fort Snelling, with the consent of said Dr. Emerson, who then claimed to be their master and owner, intermarried, and took each other for husband and wife. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat Gipsev, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza, from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, said Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them and each of them as slaves.

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Mr. Chief Justice TANEY delivered the opinion of the court.

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The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in

territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the

sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power

of a single State to make him a citizen of the United States, and endure him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

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Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen

of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

38. DUAL CITIZENSHIP AFTER THE FOURTEENTH AMENDMENT

The dual nature of citizenship in the United States since the adoption of the Fourteenth Amendment is seen in the following reading from the opinion of the court delivered by Mr. Justice Miller in the *Slaughter-House Cases*, 16 Wall. 36 (1873).

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it

overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

39. CITIZENSHIP BY BIRTH

Application of the rule of citizenship by birth under the Fourteenth Amendment is seen in the following reading taken from the report of the case of *United States v. Wong Kim Ark*, 169 U. S. 649 (1898).

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873 in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicil and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and

with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

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The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in *Calvin's Case*, 7 Rep. 6a, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides—seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on *Thrasher's Case* in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a

stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." . . .

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States.

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The Fourteenth Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue." *Osborn v. United States Bank*, 9 Wheat. 738, 827. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birth-right, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was be-

fore, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the Constitutional Amendment.

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

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The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

Order affirmed.

40. NATURALIZATION OF A NON-COMBATANT

Much difference of opinion has been expressed as to the eligibility for citizenship by naturalization of a person who is not willing to bear arms in defense of the United States. The 1946 view of the Supreme Court of the United States is expressed in the report of the case of *Girouard v. United States*, 328 U. S. 61 (1946). Mr. Chief Justice Stone, Mr. Justice Reed, and Mr. Justice Frankfurter dissented from this opinion.

Mr. Justice DOUGLAS delivered the opinion of the Court.

In 1943 petitioner, a native of Canada, filed his petition for naturalization in the District Court of Massachusetts. He stated in his application

that he understood the principles of the government of the United States, believed in its form of government, and was willing to take the oath of allegiance . . . , which reads as follows:

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

To the question in the application "If necessary, are you willing to take up arms in defense of this country?" he replied, "No (Non-combatant) Seventh Day Adventist." He explained that answer before the examiner by saying "it is a purely religious matter with me, I have no political or personal reasons other than that." He did not claim before his Selective Service board exemption from all military service, but only from combatant military duty. At the hearing in the District Court petitioner testified that he was a member of the Seventh Day Adventist denomination, of whom approximately 10,000 were then serving in the armed forces of the United States as non-combatants, especially in the medical corps; and that he was willing to serve in the army but would not bear arms. The District Court admitted him to citizenship. The Circuit Court of Appeals reversed, one judge dissenting. 149F. 2d 760. It took that action on the authority of *United States v. Schwimmer*, 279 U.S. 644; *United States v. Macintosh*, 283 U. S. 605, and *United States v. Bland*, 283 U. S. 636, saying that the facts of the present case brought it squarely within the principle of those cases. The case is here on a petition for a writ of certiorari which we granted so that those authorities might be re-examined.

The *Schwimmer*, *Macintosh* and *Bland* cases involved, as does the present one, a question of statutory construction. At the time of those cases, Congress required an alien, before admission to citizenship, to declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." It also required the court to be satisfied that the alien had during the five-year period immediately preceding the date of his application "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Those provisions were reenacted into the present law in substantially the same form.

While there are some factual distinctions between this case and the *Schwimmer* and *Macintosh* cases, the *Bland* case on its facts is indistinguishable. But the principle emerging from the three cases obliterates any factual distinction among them. As we recognized in *In re Summers*, 325 U. S. 561, 572, 577, they stand for the same general rule—that an alien

who refuses to bear arms will not be admitted to citizenship. As an original proposition, we could not agree with that rule. The fallacies underlying it were, we think, demonstrated in the dissents of Mr. Justice Holmes in the *Schwimmer* case and of Mr. Chief Justice Hughes in the *Macintosh* case.

The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship. To hold that it is required is to read it into the Act by implication. But we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. Mr. Justice Holmes stated in the *Schwimmer* case (279 U. S. p. 655) that “the Quakers have done their share to make the country what it is.” And the annals of the recent war show that many whose religious scruples prevented them from bearing arms, nevertheless were unselfish participants in the war effort. Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one’s country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his rôle may be limited by religious convictions rather than by physical characteristics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost.

Petitioner’s religious scruples would not disqualify him from becoming a member of Congress or holding other public offices. While Article VI, Clause 3 of the Constitution provides that such officials, both of the United States and the several States, “shall be bound by Oath or Affirmation, to support this Constitution,” it significantly adds that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” The oath required is in no material respect different from that prescribed for aliens under the Nationality Act. It has long contained the provision “that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear

true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion . . .” . . . As Mr. Chief Justice Hughes stated in his dissent in the *Macintosh* case (283 U. S. p. 631), “the history of the struggle for religious liberty, the large number of citizens of our country from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God”—these considerations make it impossible to conclude “that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties.”

There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of state.

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We conclude that the *Schwimmer*, *Macintosh* and *Bland* cases do not state the correct rule of law.

We are met, however, with the argument that, even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, when the Nationality Act of 1940 was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the *Schwimmer*, *Macintosh*, and *Bland* cases. Cf. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 488–489.

We stated in *Helvering v. Hallock*, 309 U. S. 106, 119, that “It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.” It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court’s own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the *Schwimmer*, *Macintosh* and *Bland* cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases. But, for us, it is enough to say that since the date of those cases Congress never acted affirmatively on this question but once and that was in 1942. At that time, as we have noted, Congress specifically granted naturalization privileges to non-combatants who like petitioner were prevented from bearing arms by their

religious scruples. That was affirmative recognition that one could be attached to the principles of our government and could support and defend it even though his religious convictions prevented him from bearing arms. And, as we have said, we cannot believe that the oath was designed to exact something more from one person than from another. Thus the affirmative action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it reenacted the oath in 1940.

Reversed.

41. ENGLISH BACKGROUND OF WRIT OF HABEAS CORPUS

Americans are likely to guard more carefully their individual rights which are protected by the Constitution if they appreciate the long struggle out of which developed such protective machinery as the Writ of Habeas Corpus. Use of this writ to prevent arbitrary imprisonment was firmly established in England as early as 1679,—about ten years before the Glorious Revolution, and nearly a hundred years before the American Revolution. A clear illustration of the carry-over of English institutions will be seen if the reader compares the number of days allowed the jailer to make his return, as provided in the English act below, with the number of days allowed for such return in the *United States Code*, Title 28, Section 456 (reading no. 19, *supra*). The excerpt below is taken from William Stubbs, *Select Charters*, Eighth Edition (Oxford: Clarendon Press, 1900).¹

A. D. 1679. THE HABEAS CORPUS ACT.

31 Car. II. c. 2.

An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonments beyond the Seas.

Whereas great delays have been used by sheriffs, gaolers, and other officers, to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *Habeas Corpus* to them directed, by standing out an *Alias* and *Pluries Habeas Corpus*, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation:

II. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority thereof, that whensoever any person or persons shall bring any *Habeas Corpus* directed unto any sheriff or sheriffs, gaoler, minister, or other person whatsoever, for

¹ Reprinted by permission.

any person in his or their custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under-officers, under-keepers or deputy of the said officers or keepers, that the said officer or officers, his or their under-officers, under-keepers or deputies, shall within three days after the service thereof as aforesaid (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment) upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same, and endorsed upon the said writ, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the court or judge to which he shall be brought according to the true intent of this present act, and that he will not make any escape by the way, make return of such writ; and bring or cause to be brought the body of the party so committed or restrained, unto or before the Lord Chancellor, or Lord Keeper of the great seal of England for the time being, or the judges or barons of the said court from whence the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment of the said party be in any place beyond the distance of twenty miles from the place or places where such court or person is or shall be residing; and if beyond the distance of twenty miles, and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days, after such delivery aforesaid, and not longer.

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42. AMERICAN USE OF WRIT OF HABEAS CORPUS

The following reading¹ indicates why "the writ of habeas corpus has been so widely regarded as the most effective method of safeguarding liberty of the person." Students will want to consider along with this one the readings numbered 19 and 41.

The author, Charles E. Wyzanski, Jr., (b.1906) is a United States Judge for the District of Massachusetts. From 1933 to 1935, he was solicitor of the Department of Labor. He has served as a member of the Committee of Experts on the Application of Conventions of the International Labor Organization, and as a member of the Council of the American Law Institute. A former lecturer at Harvard, he became an overseer of Harvard University in 1943.

PRESENT AMERICAN PRACTICE

In the United States of America both the Nation and the states have constitutional and statutory provisions for habeas corpus. Since these pro-

¹ From "The Writ of Habeas Corpus" by Charles E. Wyzanski, Jr., *The Annals of the American Academy of Political and Social Science*, Vol. 243 (January 1946); courtesy of the American Academy.

visions are not far different, it will be sufficient for present purposes to mark the salient points of only the national laws regarding habeas corpus.

In the United States Constitution the sole provision respecting habeas corpus is that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."¹ That is, the Constitution assumes but does not provide that the writ will ordinarily be available. It is a moot question, left open by *Ex parte Milligan*, 4 Wall. 2 (1866), whether under the Constitution the President acting alone can suspend the writ; but it is settled that Congress can suspend and can authorize the President to suspend the writ, as it did in 1863 during the War Between the States.

Statutory provisions for habeas corpus have been continuously on the national statute books since the Act of September 24, 1789. These statutes find their prototypes in the English Habeas Corpus Acts of 1679 and 1816. Under their provisions every United States judge has the power, and in appropriate cases the duty, to issue the writ, and the practice does not differ greatly from that in England. Application for the writ must be made under oath. If the application shows that the relator is unlawfully confined under or by color of the authority of the United States or is held in violation of the United States Constitution or laws, then the judge is required to act. The only important qualification is that where the confinement is by an officer or employee of one of the forty-eight states, then, unless there are exceptional circumstances of peculiar urgency, the applicant must show that he has exhausted his remedy in the state courts before his application will be heard in the United States court.

As in England, when the judge is required to act he may either issue the writ itself or issue what in the United States is called "a rule to show cause" why the writ should not issue (which is the precise equivalent of the English "rule nisi"). However, whichever procedure is followed, if the application of the prisoner and the return of the jailer (or his answer to the rule to show cause) show a disputed question of fact, that question must be resolved by testimony of witnesses examined in court or by deposition (and cannot, as in England, be resolved by scrutiny of affidavits).

The American practice, like that in England, permits a prisoner, no matter how often his claim of release has been denied, to make as many fresh applications to as many new judges as he chooses. However, in the United States, unlike abroad, if a lower court judge has ordered a prisoner's release, the jailer has a right of appeal, and if an appropriate judicial order is entered, the prisoner can be kept in custody until the court of last resort has made a final determination. The American courts, like those in other lands, use the writ where the allegedly unauthorized detention is not on a charge of crime.

In addition to the types of cases familiar under English practice, the United States courts issue writs of habeas corpus in two categories of cases which have involved much litigation in recent years. The writ is available

¹ Art. I § 9 cl. 2.

to test the validity of the detention of an alien under an order of a governmental department directing his deportation: that is, the writ is used to secure a judicial determination whether there is a law authorizing the deportation and whether the facts found by the department are sustained by evidence taken before the department, and bring the case within that law. The writ is also available to test whether a prisoner who has been sentenced to and is serving a term of imprisonment was at the time of his trial denied a fundamental constitutional right, such as the right to the assistance of counsel.

These somewhat anomalous uses of the writ have grown out of what was thought to be the inadequacy of other methods of review or appeal; and though they are now the most familiar examples of the writ in the day-to-day work of the United States courts, they are perhaps better regarded as illustrating the variations which the writ has exhibited in one nation, rather than the essential quality which makes the writ of fundamental importance.

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In the United States the writ of habeas corpus found its most celebrated use in *Ex parte Milligan*, 4 Wall. 2 (1866). There the writ was used to save the life of a civilian supporter of the secessionists who had been condemned to hang by a military commission. The Supreme Court of the United States held that while the regular courts were open in the state of Indiana there was no authority for a military commission to try a person not connected with the armed forces, and that Milligan was therefore entitled to have the sentence of the military commission against him disregarded and to have his liberty restored.

The *Milligan* case has perhaps somewhat obscured difficulties which existed earlier in the nineteenth century in enforcing the writ of habeas corpus in the United States in time of political crisis. During the War of 1812, United States District Judge Hall of Louisiana issued a writ to bring before him Louaillier, the editor of *The Louisiana Courier*, who had been placed under military arrest for criticizing General Andrew Jackson; but, on direction of the General, the military authorities ignored the writ and escorted Judge Hall out of the city of New Orleans. At the end of the war, however, the Judge returned to his court, found Jackson in contempt, and fined him \$1,000.

At the outset of the War Between the States, the military commander at Fort McHenry in Baltimore ignored a writ of habeas corpus issued by Chief Justice Taney to bring before the court John Merryman, who had been informally charged with various acts of treason and who was held in military custody. President Lincoln countenanced this defiance of judicial authority, as well as later substitutions of military for civil justice.

However, complete respect for the writ of habeas corpus as a protector of civil liberty characterized American authority in the First and Second World Wars. In *Ex parte Quirin*, 317 U. S. 1 (1942), prisoners of war who

had been condemned to death by a military commission on the ground that they had entered the United States as enemy saboteurs were heard by the Supreme Court of the United States on their contention that an application for writ of habeas corpus should be filed and the writ should issue to test whether the military commission had jurisdiction of their cases. The ultimate determination of the Supreme Court being that the commission did have jurisdiction, it became unnecessary to allow the application to be filed or to order the writ issued. But the case nonetheless furnishes a demonstration of how far habeas corpus procedure may be availed of even in time of war by a person who is a citizen of an enemy power and who is held in the United States as a prisoner of war. In *Ex parte Endo*, 323 U. S. 283 (1944), an American of Japanese ancestry, as a result of application for writ of habeas corpus, secured her release from the so-called War Relocation Center where persons of Japanese descent were being detained in custody solely on the ground of their ancestry. The sweep of the decision was broad enough to bring to an end all such detentions of American citizens.

ASSESSMENT OF ULTIMATE VALUE OF WRIT

The reasons why the writ of habeas corpus has been so widely regarded as the most effective method for safeguarding liberty of the person are plain from the foregoing brief review of the history, practice, and exemplification of the writ.

The writ (or the rule to show cause) issues as of right, wherever the application is fair on its face. That means there can be no plea of executive or judicial discretion.

The procedure is peremptory. Neither the judge nor the jailer can take more than the time allotted by statute.

The direction to the jailer that "you must have the body" of the prisoner before a court and must there make a "return" of the reasons for having detained him makes certain that the public will be informed openly of what arrests the executive is making and on what theory. *Lettres de cachet* are rendered impossible.

The form of the proceeding throws upon the jailer the burden of proving by what authority he holds the prisoner. That underlies the basic presumption of Anglo-American law that every man is entitled to liberty unless a pre-existing law provides for his detention.

The writ is a guarantor of what Dicey called "the rule of law." It subjects arbitrary executive imprisonment to the check of scrutiny by independent judges guided by the principles of the law of the land.

Great, however, as are the advantages of the writ, it would be unrealistic to claim that it alone will preserve the liberty of the individual. It can be disregarded, as it was in the American wars of 1812 and 1861-65, by a powerful executive who puts his view of the public safety ahead of law; or it can be thwarted, as it was in Georgian England, by a legislative

body which changes the substantive law so as to authorize an executive to arrest any person on suspicion of treason or on some other vague ground. To meet dangers of this type the only effective weapons are a widespread love of liberty, a general willingness to sacrifice for its attainment, and a popular knowledge of the ways by which it is achieved. And no way for achieving liberty of the person has been more efficient or simpler than the modern version of the medieval writ of habeas corpus.

43. CIVIL RIGHTS UNDER STATE CONSTITUTIONS

As Magna Carta, the Petition of Right, and the Bill of Rights (1689) in England served to protect individuals against totalitarian government, so bills of rights in the several states of the United States protected individuals from arbitrary state governments before and apart from the federal Constitution adopted in 1789. At the present time citizens in the United States depend upon the constitutions and the governments of the several states for the protection of many civil rights. Because of its outstanding influence, the Bill of Rights from the Constitution of Virginia adopted in 1776 is given below. It will be interesting to compare this document not only with the English Bill of Rights (reading no. 8, *supra*) but also with the first ten amendments to the Constitution of the United States (reading no. 2, *supra*). Students will remember that in many instances the organization of the federal government profited from the previous experience of state government. George Mason, of Virginia, was the principal author of the Virginia Bill of Rights. See the appendix in Volume 1 of *The Life of George Mason* by Kate Mason Rowland. The portion of the Constitution of Virginia given below is taken from Volume VII of Francis Newton Thorpe, *Federal and State Constitutions* (Washington: Government Printing Office, 1909).

THE CONSTITUTION OF VIRGINIA—1776

Bill of Rights

A declaration of rights made by the representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their posterity, as the basis and foundation of government.

SECTION 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

SEC. 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

SEC. 3. That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community;

of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and that, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and infeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.

SEC. 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.

SEC. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct.

SEC. 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assembled, for the public good.

SEC. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

SEC. 8. That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.

SEC. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

SEC. 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

SEC. 11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

SEC. 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

SEC. 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

SEC. 14. That the people have a right to uniform government; and, therefore, that no government separate from, or independent of the government of Virginia, ought to be erected or established within the limits thereof.

SEC. 15. That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

SEC. 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.

44. CIVIL RIGHTS UNDER THE FEDERAL CONSTITUTION

Noel T. Dowling (b. 1885), is Nash Professor of Law at Columbia University. He has also taught law at the University of Minnesota, the University of Virginia, and Stanford University. He has served in an advisory capacity to numerous state and national governmental agencies. He has edited *Cases on Constitutional Law* (1937, 1941, and 1946), and, with associates, *The Judicial Function in Federal Administrative Agencies* (1942).

The reading below ¹ will help the student to appreciate the fact that, for the protection of civil rights, Americans have a *legal* safeguard through the courts as well as a *political* safeguard through the ballot. In a country like England, where an Act of Parliament can not be held unconstitutional (see reading no. 26, *supra*) is there only a *political* safeguard?

Protection of Human Rights Under the United States Constitution

By Noel T. Dowling

The distinctive note to be sounded at once about essential human rights and their protection under the Constitution of the United States is that they have the quality of "legal rights" and that for their vindication

¹ From "Protection of Human Rights Under the United States Constitution" by Noel T. Dowling, *The Annals of the American Academy of Political and Social Science*, Vol. 243 (January 1946); courtesy of the American Academy.

the power of the courts may be invoked even against all branches of government. This is just another way of saying that, under the doctrine of judicial review as an established part of our constitutional scheme, it lies within the competency of the courts, when necessary for the maintenance of the individual's freedom, to stay the operation of legislative enactments or executive decrees; and, in the case of the Supreme Court, to stay or correct the judgments of other courts as well. This is our way of giving effectiveness to the protections thrown around these rights by the Constitution.

We are wont to express a great deal of this in a single term, a bill of rights. To us a bill of rights, as comprising the several rights which enjoy constitutional protection, is thus a series of "Thou shalt nots." "Congress shall make no law . . . abridging the freedom of speech." "No State shall . . . pass any . . . ex post facto law." These "shalt nots" are addressed to governments and those who act under color of public office; they are not addressed to individuals. Not man's inhumanity to man, but rather man's oppression by government, is the special stuff with which bills of rights are concerned. There are other ways of dealing with the former, or private rights; but the present point is that they do not come within the general framework of a bill of rights.

The Bill of Rights

When we turn from bills of rights in general and speak of our "Bill of Rights" in particular, the picture called up in the popular mind is that of the first ten amendments to the Constitution. Those amendments, however, do not tell the whole story; they do not set forth the full list of rights. At least two valuable ones were included in the original Constitution itself, namely, prohibition of the suspension of the writ of habeas corpus and prohibition of ex post facto laws. And care was taken to declare, in the Ninth Amendment, that the enumeration of certain rights "shall not be construed to deny or disparage others retained by the people."¹

The Bill of Rights, then, has been a stimulus to much of our thinking on the subject of human rights. Its principal provisions may be quickly indicated: freedom of religion; freedom of speech; freedom of the press; right of peaceable assembly; right of petition for redress of grievances; freedom from unreasonable searches and seizures; a series of protections for persons accused of crime (speedy and public trial, information as to the nature and cause of accusation, confrontation by adverse witnesses and compulsory process for obtaining favorable witnesses, freedom from self-incrimination, right to assistance of counsel, no double jeopardy, no excessive bail, no cruel and unusual punishment); right of trial by jury in criminal prosecutions and in certain suits at common law; prohibition against the taking of private property except for public use and with just

¹ The Tenth Amendment has no specific bearing on the protection of human rights. It has to do with a problem of federalism and is to the effect that powers not delegated to the United States nor prohibited to the states are reserved to the states or to the people.

compensation; in addition, the sweeping declaration that no person shall be deprived of life, liberty, or property without due process of law.

This last, or due process clause, is the greatest of all the instruments in the hands of the courts for the protection of the people. It has pliability enough for adaptation to the modes and needs of the changing times, and it enables the courts to annul (in the language of the cases) unreasonable, arbitrary, or capricious governmental action. It comes down to us from Magna Charta of long ago, freighted with the best of the common-law tradition. But in determining what is or is not due process of law, the courts are not limited to common-law ideas. "We are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are not unknown." The characteristic principle of the common law, the Court has observed, is "to draw its inspiration from every fountain of justice."

In drawing from these widely located fountains of justice, the Supreme Court has made the development of due process of law the occasion for a notable contribution to the subject of essential human rights. As a preliminary to that part of the story, however, two further points need to be made about the constitutional setup under which the courts operate.

Position of the States

The Bill of Rights was designed for protection against the new Central Government of the United States established in 1789. This government was in a sense foreign to, and its place of operations was in some instances far removed from, the thirteen original states. It was regarded with some apprehension by the people and with no little jealousy by the states. As against their home governments, the people did not deem additional safeguards necessary; they had made other provision for that, in the form of bills of rights in the state constitutions or otherwise. So it was that the Bill of Rights was conceived and adopted as a series of limitations on the National Government. Of its own force, it had nothing whatever to do with the states.

Forescore years later, however, a momentous change took place. The abolition of slavery (written into the Constitution in the Thirteenth Amendment, 1865) and the adoption of the Fourteenth Amendment in 1868 put a fresh emphasis on human rights. The provision in the latter, or Fourteenth Amendment, that "No State shall . . . deprive any person of life, liberty, or property, without due process of law," imposed a new limitation on the powers of the states. For the first time now there was a comprehensive external check on the ways in which the several states could deal with people within their own borders. Henceforth the due process clause would operate against the states just as a like clause and the other provisions in the Bill of Rights operated against the National Government.

Judicial Development of Due Process

We can now pick up the thread of the story of the judicial development of due process which has contributed so much to the protection of human rights. It will be noted, of course, that the Fourteenth Amendment, even with its due process clause, was still short of anything comparable to the specific provisions of the Bill of Rights. Of what significance was it on the subject of human rights? It is just there that the judicial development comes in. An early contention was urged that the Fourteenth Amendment had made the Bill of Rights operative in toto against the states. This was rejected; but after a time the Court did undertake the task of determining, as individual cases came up, whether a specific right or freedom included in the Bill of Rights was so essential to our way of life, so indispensable to a scheme of "ordered liberty," that it was absorbed by due process and thus put beyond state interference. Thus the Court made the due process clause the medium for discovering and saving the truly essential in human rights, for picking and choosing the things that really count.

To the question, then, whether a particular protection is indispensable and made applicable to the states by the due process clause of the Fourteenth Amendment, the answer is sometimes No; sometimes, and more often, Yes. So it is that we have what may seem the surprising result that while all the guaranties in the Bill of Rights were deemed requisite against the newly established Central Government a hundred and fifty years ago, a few of them are not considered indispensable for the preservation of human freedom today.

What Rights Are Indispensable?

On one side, for example, may be put the right to trial by jury and freedom from self-incrimination. Both of these, along with all others in the Bill of Rights, still enjoy the original protection against the National Government. But in the revaluation of them in the light of the basic considerations involved in due process of law, the Supreme Court has concluded that they are not so necessary to the requirements of justice that they must also be respected by the states. That is to say, as far as the Constitution of the United States is concerned, the states of this Union are free to determine for themselves what kind of a jury system or substitute therefor shall be employed, and whether an accused person shall be subject to be called to the witness stand in proceedings against himself.

On the other side, and in the same field from which the two foregoing illustrations are taken, the revaluation by the Supreme Court has produced a pattern of procedural protection for persons accused of crime which is obligatory throughout our system of law, whether in the courts of the states or of the Nation. It is, in substance, that everyone shall be entitled to have access to a competent tribunal for the determination

of charges brought against him, and further that such determination shall be made only after a fair public trial at which he shall have had an opportunity fully to be heard. To the extent that criminal proceedings are involved, there is common consent that an accused is entitled to as much, not because the Constitution prescribes it in detail, but because the Bill of Rights, the due process clause, and basic conceptions of fairness provide ample grounds and abundant inspiration for its development by the courts. Nor is any reason perceived why like protection should not be available also on the civil side, in the determination of one's rights as well as his liabilities. Not so much, however, has been developed as yet. All this could be pretty well compressed into a single provision; and one on those lines is almost certain for inclusion in any general declaration of essential human rights.

Ownership of property also comes in for its measure of protection under the Bill of Rights. It is expressly provided that the National Government shall not take private property for public use without just compensation; and the due process clause imposes a like limitation upon the states. The limitation, it will be observed, is not against the taking; for eminent domain is the well-recognized legal method by which private property can be acquired for public use. What the owner is entitled to, in turn, is to be made economically whole, to receive the full market value of the property of which he has been deprived. And it is a judicial question whether the compensation is "just," within the constitutional requirement.

The Preferred Rights

But it is outside the area of economic affairs and in the realm where matters of the mind are affected that judicial protection rises to the highest plane. More particularly, the Supreme Court has put a special emphasis on the four rights with which the First Amendment has come to be synonymous, namely: speech, press, assembly, and religion. Indeed, "freedom of thought and speech," the Supreme Court has said, "is the matrix, the indispensable condition, of nearly every other form of freedom."

So high a social value is placed on the four rights just mentioned that they are accorded a preferred position for judicial protection. So strong is this preference that a heavy burden is put on the state to justify any interference with them. In ordinary cases where economic interests are at stake a presumption runs in favor of governmental action, and anyone objecting to it must carry the full burden of demonstrating its arbitrary effect. But here the case is the other way round, and, as has been said, the state must justify its interference. Moreover, under a doctrine to which the Supreme Court appears to be committed, the only ground of justification seems to be to avoid "clear and present danger" to interests which the state is entitled to protect. Whatever its defect in definiteness or in difficulties of application (there are many), the doctrine of clear and present danger serves to indicate the extremely limited range of permissible state interference.

Vindication of Rights

When we turn to the means for the vindication of these rights, hardly more needs to be said than that they would make up a cross section of procedures for the litigation of constitutional issues. Basically the problem is one of review of the validity of governmental action, and there are various ways in which an aggrieved party can bring the matter to a determination in the courts. For one, he may start a suit in advance to enjoin the enforcement of the statute or the taking of any other action of which he complains as contrary to his rights. Or, he may wait until proceedings have been begun to compel him to comply with a given statute or punish him for noncompliance, and then make his defense on the ground that such compulsion or punishment would be unconstitutional. Or again, if he has followed neither of these courses he may, in exceptional circumstances and even after conviction, still obtain a judicial inquiry into the validity of what has been done. Whether the tribunal to which he turns be that of the state or of the Nation, he may make the same kind of claim and is entitled to the same kind of relief. The reason is that the Constitution is the supreme law, to the enforcement of which all judges are bound. If state procedures prove deficient, recourse may be had to Federal courts. A reassuring feature of our legal system is that, within appropriate limits of appellate jurisdiction, a claim of unconstitutional interference with one's freedom opens a road all the way from the lowliest official to the highest court in the land.

And the note on which this story may well close is that these rights are recognized in aliens and citizens alike, without regard to country or color or creed. Dignity of the person and worth of the human being are special objects of solicitude under the Constitution of the United States.

45. DUE PROCESS OF LAW

In holding that the words "due process of law" in the Fourteenth Amendment do not necessarily require in a state criminal proceeding the use of a grand jury as is required in a federal case under the Fifth Amendment, Mr. Justice Matthews said: "Due process of law in the [Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of these fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." . . . "It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in

furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." *Hurtado v. People of California*, 110 U.S. 516 (1884).

In *Brown v. New Jersey*, 175 U.S. 172 (1899), Mr. Justice Brewer said: "The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution."

In several instances the Supreme Court of the United States has reversed the decisions of state courts upon the failure of the state courts to observe fundamental principles of liberty and justice. An illustration is given in the reading below. Other illustrations may be found in *Moore v. Dempsey*, 261 U.S. 86 (1923), an Arkansas case in which a mob influenced the trial court; and in *Powell v. Alabama*, 287 U.S. 45 (1932), the famous Scottsboro case in which the Supreme Court of the United States held (headnote 4): "The right of the accused, at least in a capital case, to have the aid of counsel for his defense, which includes the right to have sufficient time to advise with counsel and to prepare a defense, is one of the fundamental rights guaranteed by the due process clause of the Fourteenth Amendment."

The reading below is taken from the decision of the Supreme Court of the United States in the case of *Chambers et al. v. Florida*, 309 U.S. 227 (1940).

MR. JUSTICE BLACK delivered the opinion of the Court.

The grave question presented by the petition for certiorari, granted in forma pauperis, is whether proceedings in which confessions were utilized, and which culminated in sentences of death upon four young negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment.

First. The State of Florida challenges our jurisdiction to look behind the judgments below claiming that the issues of fact upon which petitioners base their claim that due process was denied them have been finally determined because passed upon by a jury. However, use by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns.

Second. The record shows—

About nine o'clock on the night of Saturday, May 13, 1933, Robert Darsey, an elderly white man, was robbed and murdered in Pompano, Florida, a small town in Broward County about twelve miles from Fort Lauderdale, the County seat. The opinion of the Supreme Court of Florida

affirming petitioners' conviction for this crime stated that "It was one of those crimes that induced an enraged community . . ." And, as the dissenting judge pointed out, "The murder and robbery of the elderly Mr. Darsey . . . was a most dastardly and atrocious crime. It naturally aroused great and well justified public indignation."

Between 9:30 and 10 o'clock after the murder, petitioner Charlie Davis was arrested, and within the next twenty-four hours from twenty-five to forty negroes living in the community, including petitioners Williamson, Chambers, and Woodward, were arrested without warrants and confined in the Broward County jail, at Fort Lauderdale. On the night of the crime, attempts to trail the murderers by bloodhounds brought J. T. Williams, a convict guard, into the proceedings. From then until confessions were obtained and petitioners were sentenced, he took a prominent part. About 11 P.M. on the following Monday, May 15, the sheriff and Williams took several of the imprisoned negroes, including Williamson and Chambers, to the Dade County jail at Miami. The sheriff testified that they were taken there because he felt a possibility of mob violence and "wanted to give protection to every prisoner . . . in jail." Evidence of petitioners was that on the way to Miami a motorcycle patrolman drew up to the car in which the men were riding and the sheriff "told the cop that he had some negroes that he—[was] taking down to Miami to escape a mob." This statement was not denied by the sheriff in his testimony and Williams did not testify at all; Williams apparently has now disappeared. Upon order of Williams, petitioner Williamson was kept in the death cell of the Dade County jail. The prisoners thus spirited to Miami were returned to the Fort Lauderdale jail the next day, Tuesday.

It is clear from the evidence of both the State and petitioners that from Sunday, May 14, to Saturday, May 20, the thirty to forty negro suspects were subjected to questioning and cross questioning (with the exception that several of the suspects were in Dade County jail over one night). From the afternoon of Saturday, May 20, until sunrise of the 21st, petitioners and possibly one or two others underwent persistent and repeated questioning. The Supreme Court of Florida said the questioning "was in progress several days and all night before the confessions were secured" and referred to the last night as an "all night vigil." The sheriff who supervised the procedure of continued interrogation testified that he questioned the prisoners "in the day time all the week," but did not question them during any night before the all night vigil of Saturday, May 20, because after having "questioned them all day . . . [he] was tired." Other evidence of the State was "that the officers of Broward County were in that jail almost continually during the whole week questioning these boys, and other boys, in connection with this" case.

The process of repeated questioning took place in the jailer's quarters on the fourth floor of the jail. During the week following their arrest and until their confessions were finally acceptable to the State's Attorney in the early dawn of Sunday, May 21st, petitioners and their fellow prisoners

were led one at a time from their cells to the questioning room, quizzed, and returned to their cells to await another turn. So far as appears, the prisoners at no time during the week were permitted to see or confer with counsel or a single friend or relative. When carried singly from his cell and subjected to questioning, each found himself, a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers and citizens of the community.

The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after daylight. Be that as it may, it is certain that by Saturday, May 20th, five days of continued questioning had elicited no confession. Admittedly, a concentration of effort—directed against a small number of prisoners including petitioners—on the part of the questioners, principally the sheriff and Williams, the convict guard, began about 3:30 that Saturday afternoon. From that hour on, with only short intervals for food and rest for the questioners—"They all stayed up all night." "They bring one of them at a time backwards and forwards . . . until they confessed." And Williams was present and participating that night, during the whole of which the jail cook served coffee and sandwiches to the men who "grilled" the prisoners.

Sometime in the early hours of Sunday, the 21st, probably about 2:30 A.M., Woodward apparently "broke"—as one of the state's witnesses put it—after a fifteen or twenty minute period of questioning by Williams, the sheriff and the constable "one right after the other." The State's Attorney was awakened at his home, and called to the jail. He came, but was dissatisfied with the confession of Woodward which he took down in writing at that time, and said something like "tear this paper up, that isn't what I want, when you get something worth while call me." . . .

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After one week's constant denial of all guilt, petitioners "broke."

Just before sunrise, the state officials got something "worthwhile" from petitioners which the State's Attorney would "want"; again he was called; he came; in the presence of those who had carried on and witnessed the all-night questioning, he caused his questions and petitioners' answers to be stenographically reported. These are the confessions utilized by the State to obtain the judgments upon which petitioners were sentenced to death. No formal charges had been brought before the confessions. Two days thereafter, petitioners were indicted, were arraigned and Williamson and Woodward pleaded guilty; Chambers and Davis pleaded not guilty. Later the sheriff, accompanied by Williams, informed an attorney who presumably had been appointed to defend Davis that Davis wanted his plea of not guilty withdrawn. This was done, and Davis then pleaded guilty. When Chambers was tried, his conviction rested upon his confession

and testimony of the other three confessors. The convict guard and the sheriff "were in the Court room sitting down in a seat." And from arrest until sentenced to death, petitioners were never—either in jail or in court—wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions.

Third. The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorably utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by "the law of the land" forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always

been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment. Where one of several accused had limped into the trial court as a result of admitted physical mistreatment inflicted to obtain confessions upon which a jury had returned a verdict of guilty of murder, this Court recently declared, *Brown v. Mississippi*, that "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was clear denial of due process."

Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by state officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance. Just as our decision in *Brown v. Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that "The undisputed facts showed that compulsion was applied."

For five days petitioners were subjected to interrogations culminating in Saturday's (May 20th) all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. Some were practical strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance. The rejection of petitioner Woodward's first "confession," given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which "broke" petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an

equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.

The Supreme Court of Florida was in error and its judgment is
Reversed.

46. FREEDOM OF SPEECH AND OF PRESS

Some Americans thought the Fourteenth Amendment to the Constitution would secure to individuals against state action all the rights secured to individuals against federal action by the first eight amendments to the Constitution. In the report of the case of *Maxwell v. Dow*, 176 U.S. 581, one of the headnotes reads: "The privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government."

In the reading below, it will be seen that the court considers "the freedom of speech and that of the press as fundamental personal rights and liberties" and that: "The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." Of course the Fourteenth Amendment would secure all persons, also, against abridgment by cities or towns (municipalities), as cities or towns are parts of and governmental agents of particular states.

The question of the conflict of a municipal ordinance with provisions of the federal Constitution may be raised in the first court before which a defendant appears. The constitutional question is not necessarily postponed until the case is appealed to the Supreme Court of the United States. City and state judges, as well as federal judges, are under obligation to declare a municipal ordinance invalid if it conflicts with the provisions of the federal Constitution. Many cases which are decided on the basis of unconstitutionality never reach the Supreme Court of the United States, though that court is the highest authority in ruling upon the application of the provisions of the federal Constitution.

In considering freedom of speech and freedom of press, students should remember that there may be enforceable restrictions in war-time that would not be upheld in time of peace. In the case of *Schenck v. United States*, 249 U.S. 47 (1919), Mr. Justice Holmes

said: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."

The reading below in which the constitutionality of an ordinance of the Town of Irvington, New Jersey, was involved is taken from the opinion of the Supreme Court of the United States, delivered by Mr. Justice Roberts, in *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939).

The petitioner was arrested and charged with canvassing without a permit. The proofs show that she is a member of the Watch Tower Bible and Tract Society and, as such, certified by the society to be one of "Jehovah's Witnesses." In this capacity she called from house to house in the town at all hours of the day and night and showed to the occupants a so-called testimony and identification card signed by the society. The card stated that she would leave some booklets discussing problems affecting the person interviewed; and that, by contributing a small sum, that person would make possible the printing of more booklets which could be placed in the hands of others. The card certified that the petitioner was an ordained minister sent forth by the society, which is organized to preach the gospel of God's kingdom, and cited passages from the Bible with respect to the obligation so to preach. The petitioner left, or offered to leave, the books or booklets with the occupants of the houses visited. She did not apply for, or obtain, a permit pursuant to the ordinance because she conscientiously believed that so to do would be an act of disobedience to the command of Almighty God.

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The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state.

Although a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.

Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not

accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

In *Lovell v. City of Griffin, supra*, this court held void an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the city manager. The opinion pointed out that the ordinance was not limited to obscene and immoral literature or that which advocated unlawful conduct, placed no limit on the privilege of distribution in the interest of public order, was not aimed to prevent molestation of inhabitants or misuse or littering of streets, and was without limitation as to time or place of distribution. The court said that, whatever the motive, the ordinance was bad because it imposed penalties for the distribution of pamphlets, which had become historical weapons in the defense of liberty, by subjecting such distribution to license and censorship; and that the ordinance was void on its face, because it abridged the freedom of the press. Similarly in *Hague v. C. I. O.*, 307 U. S. 496, an ordinance was held void on its face because it provided for previous administrative censorship of the exercise of the right of speech and assembly in appropriate public places.

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While it affects others, the Irvington ordinance drawn in question in No. 11, as construed below, affects all those, who, like the petitioner, desire to impart information and opinion to citizens at their homes. If it covers the petitioner's activities it equally applies to one who wishes to present his views on political, social or economic questions. The ordinance is not limited to those who canvass for private profit; nor is it merely the common type of ordinance requiring some form of registration or

license of hawkers, or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the "project" he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion.

As said in *Lovell v. City of Griffin, supra*, pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house. Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty. We do hold, however, that the ordinance in question, as applied to the petitioner's conduct, is void, and she cannot be punished for acting without a permit.

47. RESPONSIBILITIES OF CITIZENSHIP

Lawrence Pearsall Jacks (1860–), outstanding English author, editor, and theologian, was born in Nottingham. His formal education included attendance upon the universities of London, Göttingen, and Harvard. In recognition of his achievements, a number of educational institutions have conferred honorary degrees upon him. He served as Principal of Manchester College, Oxford, from 1915 to 1931. Ever since its foundation in 1902, he has been editor of the *Hibbert Journal*. Of his many writings, one of the best known is the book ¹ from which the following reading is taken, published in 1928.

History shows—and history has no deeper lesson to teach—that the institutions that *last* longest, that link human beings together in the most abiding and beneficent fellowship, are those that rest upon a *fiduciary basis*, those that embody a tradition of trustworthy service, those that gather to their service a continuous succession of honourable and loyal men—an historic church, for example, a university, a scientific fraternity, the medical and legal professions, and, in the field of economics, such institutions as banking and mutual insurance. These are the institutions which, while not exempt from decay, last longest, gathering vitality as they go, becoming not weaker with age, but stronger and more beneficent, in contrast with institutions that rest on force or coercion and begin to decay from the moment they are set up. There is a correlation between the lastingness of an institution and the fiduciary character of its service.

Guided by that hint I will now proceed to specify what seem to me the three main elements in the staying power of human society.

We find the first in the immense capacity for skilful work which civilized man has acquired and passed on down the course of the ages. We may call it the capacity of his intelligence. The second, in the possession, by large numbers of men and women, of certain high qualities, in virtue of which they act faithfully as *trustees* for the general interest and in the accumulating traditions that gather round their service. We may call this the moral capacity of the citizen. The third, in the creation and continuous improvement of certain scientific methods for harmonizing conflicting claims and for turning human relations, which would otherwise be mutually destructive, into relations of mutual helpfulness. We may call it man's organizing power.

Skill, trusteeship, scientific method, these three, which are obviously related to one another, indicate the main sources of strength in modern civilization. Taken together, they constitute a magnificent endowment deeply based in the past, maintaining the civilization of the present, and inviting development in the interests of a better civilization yet to be.

With these words before us, skill, trusteeship, and science, we discern three converging lines on which constructive citizenship will operate. It

¹ *Constructive Citizenship* by L. P. Jacks; excerpts used by permission of Harper & Brothers.

will aim at the development of skill in every variety of socially valuable occupation, at the training and multiplication of trustees, at the perfecting of the scientific methods by which conflicting and dangerous interests can be brought into harmony and oppositions transformed into co-operations.

The three aims obviously involve one another. For example, constructive citizenship achieves nothing by scientific methods of organization unless at the same time it can produce trustees to administer those methods when created; perhaps less than nothing, because scientific methods are the most dangerous of all when the administration of them falls into untrustworthy or incompetent hands. Nor is the skill of the worker of value to society unless the worker make use of his skill as a trustee for the common good. As to science, we have often been warned of late of the dangers attending the progress of it; of how discoveries that might be turned into beneficent channels are liable to be used as instruments of destruction. Exactly the same is true of social science. The more perfect we make our social organization, whether in the form of the scientific state or any other, the more essential it becomes that the fiduciary spirit should be operative through the entire body of the citizens. The training and multiplication of social trustees is the pivot of the entire operation before us.

Nor is the attempt at all a hopeless one. The basis for it already exists. In all departments of our social life—in politics, in finance, in commerce, in labour, in education—there is, at this moment, a significant multitude of men and women who are performing fiduciary functions in an admirable manner. There are traitors also; but these sinister exceptions leave us the more impressed by the general faithfulness. I do not hesitate to say that of all the phenomena industrial civilization displays, the most significant and the most encouraging is the presence in all professions and ranks of industry of the type I am here indicating—of persons who show that they can be relied upon in positions of high and delicate trust, without being watched, spied upon, or policed. The capacity of industrial civilization to evolve this type of citizen is perhaps the best thing that can be said in its favour. There is no reason why the type should not be multiplied to any extent that may be needed.

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This last is, perhaps, the most important of all the questions we shall have to consider. What is the type of citizen that our training aims at? Constructive citizenship answers the question by one word—the word “trustee.” The type of citizen our civilization is calling for, and without which it cannot be maintained, is the type which accepts a vocation, whatever that may chance to be, as a trust committed to it, and which can be trusted, and freely trusted, to carry out the work it undertakes with the utmost skill and fidelity the case admits of. The opposite type, which needs to be coerced into doing its duty, which neglects its duty unless social pressure or legal penalties compel the performance of it, may have sufficed

when the citizen was regarded as a "subject" of the ruling power, but is utterly inadequate to maintain the life of a free community composed of responsible individuals and dependent on the willingness of each individual to do his best. Our civilization, if it is to survive at all, must produce and train a different type of personnel from that of the unwilling "subject" who needs to be coerced, and must produce it not in isolated instances only, but as a characteristic of citizenship in general.

Think, then, of some person known to you—and such persons are known to most of us—in whose hands you would feel your own interests to be perfectly safe, a person incapable of betraying your trust, or exploiting it to his own advantage, and you have before you the very ideal of citizenship which all methods of education and systems of "civics" should aim at realizing; no man to be accounted "educated" unless he be a man whom his neighbours can trust, the type needed, not only in the high places of power, but in every rank and level of industrial activity, in every workshop or office where goods are produced or services exchanged. Difficult—who doubts it?—but not to be called impossible until a resolute attempt has been made to train citizenship on those lines, which has not been done as yet.

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There are certain philosophers who maintain that a thing is what it does. Whether or no that be good metaphysics, it is certain that we can never understand what anything is unless we also understand what it does. And the same is true, but more obviously, when you are defining a person, or a class of persons. If you define man as a two legged animal, you indicate his manner of locomotion—you tell us something of what he does. No structure can be understood, certainly not a living structure like a man, unless we see the function it performs. The function performed by the citizen as that of *bearing and fulfilling responsibility*.

Moreover, when anything is being defined, it is difficult to say what the thing is without at the same time saying what somebody *ought* to do. If we define man as a being who walks on two legs we imply that he ought to walk upright and not to spend his life in a seated or motionless attitude. If we define the snake as a poisonous reptile, we warn people to be circumspect in the handling of snakes. If we put the label "prussic acid" on the outside of a bottle we virtually say "let no man drink this." If we call a thing good we bid all men respect, support it, and do likewise. If we call a thing evil we bid them condemn, oppose it, and *not* do likewise. The indicative mood of our definition changes insensibly into the imperative mood of a command, the noun into the verb. All truth, at bottom, is imperative. Lay bare the bones of it and you will find yourself confronted with a command. Truth indicates a direction to be actively taken rather than a position to be passively occupied, an activity rather than a thing, a power rather than a bare existence. This holds true even

of social philosophy. Every truth in that department becomes a command as soon as you have spoken it.

In like manner the definition of citizenship, or of a citizen, cannot be separated from the statement of his duties, of what he ought to do. To be a citizen is to be an actively responsible person, a person, that is, who ought to do things, a person with duties. The citizen is, no doubt, a recipient of services from his fellow-citizens, enjoying benefits which the State or the social system confers upon him, the fortunate heir of the social inheritance, a person protected by the law, sitting in security under his own vine and fig-tree, none daring to make him afraid. But this good fortune of his, as the recipient of benefits conferred upon him by his fellows, or as the heir of former ages, measures the service his age demands of him. The greater the benefits conferred upon him, the more extensive become his responsibilities. His security is guaranteed him not that he may enjoy it in selfish isolation, but that he may have an assured basis for serving the community. His rights are nothing without his duties. At no point do his rights relieve him of his responsibilities; they create them at every point.

His chief right, as I have said, is the *right to responsibility*. In the days when the vote was denied to women did they not resent that condition as a deprivation of their right to responsibility? Responsibility, they said, we must and will have, and in their wrath at not having it some of them went to great lengths. Granted the citizen has the right to enjoy his life as a reasonable being; but over and above that he has the right to be serviceable, to be valuable to his fellow-men, and to be conscious that he is so. The worst wrong you can do him is to place him in a condition where he is of no value to others, where he has no opportunities for service, where he has no duties that are worth doing, where he is so pampered on the one hand, or so impoverished on the other, that he is of no use to anybody. Once more, he has the *right to duty*.

He has the right to it; and not only to duties that are safe and easy and enjoyable, but also to others which are dangerous and difficult and burdensome. He has the right to risk his life in the service of his fellows and to lay it down for them if he chooses to do so. The right to work, certainly, and not only to work for fair wages, but also to work for no wages at all; if he chooses to do so, as some of the best men will always choose.

Let me give you an instance out of the modern world. There recently died in America Dr. Charles Proteus Steinmetz. He was a pioneer in developing the uses of electricity, a genius in that department, and for many years had been a technical expert in the service of the General Electric Company, one of the great industrial corporations of America. He was reputed to be enormously rich, and many tall tales were told of his shareholdings in the company and of the colossal salary he received for his services. When his will was made public people learned to their astonishment that all the goods he possessed in this world consisted of a workman's life policy for £300, an antiquated car, and a few other trifles. It then

turned out that his shareholdings were *nil*, and that he had received no salary at all. By his own act and will he had refused these things. "I will do my work for its own sake," he said; "money shall have nothing to do with it." Whether that is an example to be followed I do not discuss, but I do say that Steinmetz was exercising a right which every free citizen possesses, the right to work for no wages at all. I think he belonged to the same denomination as Hussein Ali, "mechanic and mathematician and servant of the Most High God."

The responsible citizen has the right to seek his fortune in a fair field, but has he not also the right to throw in his lot with the unfortunate and the oppressed, where the field is unfair, and to have his fortune counted out to him in the same coin as theirs? He has the right to play the losing game as well as the winning one. He has the right to enjoy happiness—if you will—but has he not also the right to suffer pain, "to gather the spear-points into his own bosom," like Arnold Winkelried, if his duty points that way? I count this among the most significant rights of man, inseparable from the right to duty and conditioning every other right he can be said to possess—*the right to pain*.

The "ideal social system" is sometimes represented as though it would automatically relieve the citizen of his responsibilities, as lifting that burden off his back and bearing it for him. The citizen has only to put his vote into the ballotbox, as he would put a penny in the slot, and the ideal social system will do the rest. We sometimes think that this is just the system that would suit us; but, in reality, none of us could endure it for a day. It would deprive us of our right to responsibility, the last thing a free man will surrender. Surely we shall be nearer the mark if we say that a good social system provides its members with a continual opportunity of exchanging lower responsibilities for higher, of transforming the one into the other. The history of a progressive civilization is the record of an ever increasing Trust and of a growing demand for trustees. When the trustees fail to appear the civilization falls, let its social system be what it may.

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The rights and duties of citizenship present themselves, as I conceive the matter, under three main aspects, political, industrial, and cosmic. Each of us is, first, a citizen of the country in which he was born; second, a citizen of this small but busy planet, the earth; and, third, a citizen of the wide universe. As voter he belongs to his country; as worker he belongs to mankind; as human being he belongs to the universe. He carries rights and duties in each separately and in all together.

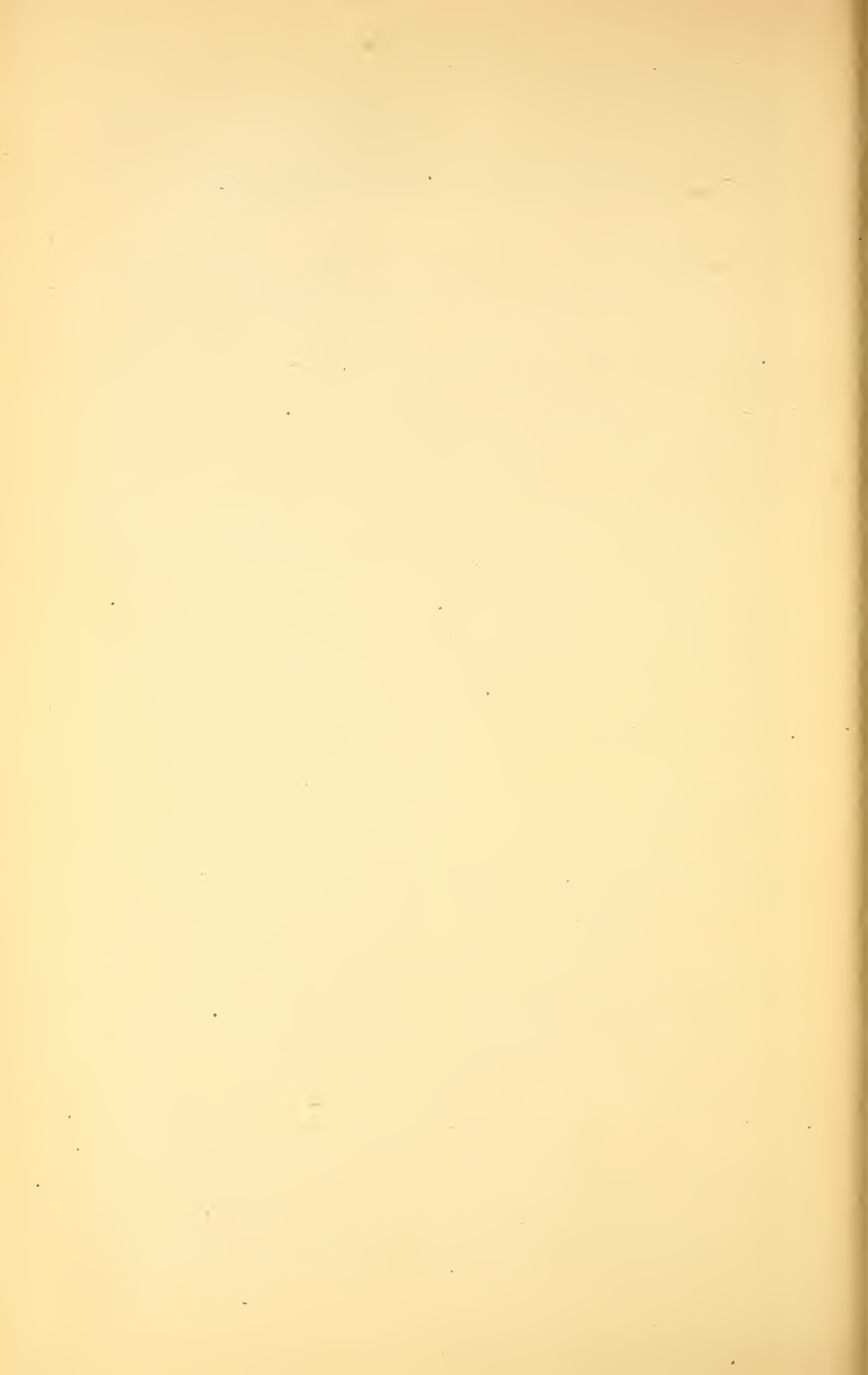
These three forms of citizenship are very closely interrelated and interdependent. We cannot understand our duties (which involve our rights) as citizens in any one of the three unless we remember our place in the other two. Our responsibilities as voters in the country where we were born are closely connected with our responsibilities as workers in the

international community of producers and consumers ; and both are deeply rooted in our responsibilities as human beings. Each acts and reacts with the others, and from their interactions there arises a system of rights and duties extremely complicated, but having an inner unity, infinitely worth while, deep as the universe of time, wide as the universe of space.

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The fault that impresses me in all the pictures of Utopia that have come my way, at least with those that have been offered us in modern times, is that of overlooking this essential fact. The authors of these Utopias do not appear to see that, as society rises to higher levels of civilization, the greater becomes the social tension in maintaining the common life at the higher level that has been reached. They depict the ideal society as a perfectly constructed machine which runs of itself like a clock that has been wound up, leaving the members of it free from the tension of life, and with nothing before them but a continued existence of lighthearted irresponsibility. They do not seem to realize that these are conditions impossible for human beings, made as they are, to live under.

Without some interludes of lighthearted irresponsibility life indeed would be intolerable to all of us. But it would be no less intolerable, but far more so, if there were nothing else in store for us. Human progress is not in that direction. As the level rises the tension increases. As the values of life become greater the risk of losing them becomes more formidable and the duty of guarding them more insistent. Society does not advance by diminishing the responsibility of its members, but by extending the area of it, by awaking the sense of it in all classes of the community, until every citizen, rich or poor, head worker or hand worker, has learnt to regard himself as a responsible trustee for the common good, taking his share not only in the benefits which civilization has to confer, but in the burdens it has to bear and in the dangers of the never-ceasing warfare it has to wage. A high civilization is possible only on the condition that the whole body of the citizens, and not a section of them only, are willing to share in the labour of maintaining it, in the high tensions created by the forces that would pull it down. If we look upon our citizenship as merely entitling us to a share of the good things that happen to be going we are taking sides with the forces that retard the progress of the human race. Progress means that you are extending the sense of responsibility to those who lacked it before, and are deepening it in those who have it already.



IX

Suffrage and Political Parties



48. RIGHT OF SUFFRAGE NOT CONFERRED BY U. S. CONSTITUTION

Minor v. Happersett

49. NEGRO SUFFRAGE

Smith v. Allwright

50. YOUTH SUFFRAGE

Stubbs, "Georgia Lowers the Voting Age"

51. "THE FUTURE OF PARTY GOVERNMENT"

Odegard and Helms, *American Politics*

52. (A) POLITICAL COMPROMISE; (B) LEADERSHIP FOR DEMOCRACY

Beneš, *Democracy Today and Tomorrow*

53. "MAJORITY AND MINORITY POLICY COMMITTEES"

Senate Report No. 1011

54. "WHY THE PRIMARIES ARE MORE IMPORTANT THAN THE GENERAL ELECTION"

Kent, *The Great Game of Politics*

55. NATIONAL NOMINATING CONVENTIONS

Catledge, "It Could Only Happen Here"

THOUGH suffrage is primarily controlled by the laws of the several states, the central government in the United States sets certain limits which restrict the freedom of the individual states in such control. The increasing significance of the federal restrictions, the importance of nation-wide political parties, and the need for intelligence in political action are reflected in readings in this chapter.

SUFFRAGE AND POLITICAL PARTIES



48. RIGHT OF SUFFRAGE NOT CONFERRED BY U. S. CONSTITUTION

The distinct separation of voting from citizenship and the absence of a positive federal foundation for suffrage are seen in the following reading from the unanimous opinion of the Supreme Court of the United States, delivered by Mr. Chief Justice Waite in the case of *Minor v. Happersett*, 21 Wall. 162 (1874).

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. The case was undoubtedly brought to this court for the sole purpose of having that question decided by us, and in view of the evident propriety there is of having it settled, so far as it can be by such a decision, we have concluded to waive all other considerations and proceed at once to its determination.

It is contended that the provisions of the constitution and laws of the State of Missouri which confine the right of suffrage and registration therefor to men, are in violation of the Constitution of the United States, and therefore void. The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.

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Other proof of like character might be found, but certainly more cannot be necessary to establish the fact that sex has never been made one

of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State legislature. Senators are to be chosen by the legislatures of the States, and necessarily the members of the legislature required to make the choice are elected by the voters of the State. Each State must appoint in such manner, as the legislature thereof may direct, the electors to elect the President and Vice-President. The times, places, and manner of holding elections for Senators and Representatives are to be prescribed in each State by the legislature thereof; but Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators. It is not necessary to inquire whether this power of supervision thus given to Congress is sufficient to authorize any interference with the State laws prescribing the qualifications of voters, for no such interference has ever been attempted. The power of the State in this particular is certainly supreme until Congress acts.

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added

the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. Thus, in New Hampshire, "every male inhabitant of each town and parish with town privileges, and places unincorporated in the State, of twenty-one years of age and upwards, excepting paupers and persons excused from paying taxes at their own request," were its voters; in Massachusetts "every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds;" in Rhode Island "such as are admitted free of the company and society" of the colony; in Connecticut such persons as had "maturity in years, quiet and peaceable behavior, a civil conversation, and forty shillings freehold or forty pounds personal estate," if so certified by the selectmen; in New York "every male inhabitant of full age who shall have personally resided within one of the counties of the State for six months immediately preceding the day of election . . . if during the time aforesaid he shall have been a freeholder, possessing a freehold of the value of twenty pounds within the county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to the State;" in New Jersey "all inhabitants . . . of full age who are worth fifty pounds, proclamation-money, clear estate in the same, and have resided in the county in which they claim a vote for twelve months immediately preceding the election;" in Pennsylvania "every freeman of the age of twenty-one years, having resided in the State two years next before the election, and within that time paid a State or county tax which shall have been assessed at least six months before the election;" in Delaware and Virginia "as exercised by law at present;" in Maryland "all freemen above twenty-one years of age having a freehold of fifty acres of land in the county in which they offer to vote and residing therein, and all freemen having property in the State above the value of thirty pounds current money, and having resided in the county in which they offer to vote one whole year next preceding the election;" in North Carolina, for senators, "all freemen of the age of twenty-one years who have been inhabitants of any one county within the State twelve months immediately preceding the day of election, and possessed of a freehold within the same county of fifty acres of land for six months next before and at the day of election,"

and for members of the house of commons "all freemen of the age of twenty-one years who have been inhabitants in any one county within the State twelve months immediately preceding the day of any election, and shall have paid public taxes;" in South Carolina "every free white man of the age of twenty-one years, being a citizen of the State and having resided therein two years previous to the day of election, and who hath a freehold of fifty acres of land, or a town lot of which he hath been legally seized and possessed at least six months before such election, or (not having such freehold or town lot), hath been a resident within the election district in which he offers to give his vote six months before said election, and hath paid a tax the preceding year of three shillings sterling towards the support of the government;" and in Georgia such "citizens and inhabitants of the State as shall have attained to the age of twenty-one years, and shall have paid tax for the year next preceding the election, and shall have resided six months within the county."

In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By Article 4, section 2, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (the fourteenth), "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in the rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of

citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated if suffrage was the absolute right of all citizens.

And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?

It is true that the United States guarantees to every State a republican form of government. It is also true that no State can pass a bill of attainder, and that no person can be deprived of life, liberty, or property without due process of law. All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

The same may be said of the other provisions just quoted. Women

were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change. So also of the amendment which declares that no person shall be deprived of life, liberty, or property without due process of law, adopted as it was as early as 1791. If suffrage was intended to be included within its obligations, language better adapted to express that intent would most certainly have been employed. The right of suffrage, when granted, will be protected. He who has it can only be deprived of it by due process of law, but in order to claim protection he must first show that he has the right.

But we have already sufficiently considered the proof found upon the inside of the Constitution. That upon the outside is equally effective.

The Constitution was submitted to the States for adoption in 1787, and was ratified by nine States in 1788, and finally by the thirteen original States in 1790. Vermont was the first new State admitted to the Union, and it came in under a constitution which conferred the right of suffrage only upon men of the full age of twenty-one years, having resided in the State for the space of one whole year next before the election, and who were of quiet and peaceable behavior. This was in 1791. The next year, 1792, Kentucky followed with a constitution confining the right of suffrage to free male citizens of the age of twenty-one years who had resided in the State two years or in the county in which they offered to vote one year next before the election. Then followed Tennessee, in 1796, with voters of freemen of the age of twenty-one years and upwards, possessing a freehold in the county wherein they may vote, and being inhabitants of the State or freemen being inhabitants of any one county in the State six months immediately preceding the day of election. But we need not particularize further. No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it. Since then the governments of the insurgent States have been reorganized under a requirement that before their representatives could be admitted to seats in Congress they must have adopted new constitutions, republican in form. In no one of these constitutions was suffrage conferred upon women, and yet the States have all been restored to their original position as States in the Union.

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The

same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we

AFFIRM THE JUDGMENT.

49. NEGRO SUFFRAGE

Efforts of Southern states to deprive the Negro of the ballot despite the provisions of the Constitution of the United States have led to court contests and eventually to important decisions by the Supreme Court of the United States. Outstanding among these decisions are *Smith v. Allwright*, 321 U. S. 649 (1944), from which the following reading is taken, and the cases reviewed by the court therein.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages in the sum of \$5,000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas, for the refusal of respondents, election and associate election judges respectively of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate §§ 31 and 43 of Title 8 of the United States Code in that petitioner was deprived of rights secured by §§ 2 and 4 of Article I and the Fourteenth, Fifteenth and Seventeenth Amendments to the United States Constitution. The suit was filed in the District Court of the United States for the Southern District of Texas, which had jurisdiction under Judicial Code § 24, subsection 14.

The District Court denied the relief sought and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grove v. Townsend*, 295 U. S. 45. We granted the petition for certiorari to resolve a claimed inconsistency between the decision in the *Grove* case and that of *United States v. Classic*, 313 U. S. 299. 319 U. S. 738.

The State of Texas by its Constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence in the district or county "shall be deemed a qualified elector." Constitution of Texas, Article VI, § 2; Vernon's Civil Statutes (1939 ed.), Article 2955. Primary elections for United States Senators, Congressmen and state officers are provided for by Chapters Twelve and Thirteen of the statutes. Under these chapters, the Democratic party was required to hold the primary which was the occasion of the alleged wrong to petitioner. . . . These nominations are to be made by the qualified voters of the party. Art. 3101.

The Democratic party of Texas is held by the Supreme Court of that State to be a "voluntary association," *Bell v. Hill*, 123 Tex. 531, 534, protected by § 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the State except that:

"In the interest of fair methods and a fair expression by their members of their preferences in the selection of their nominees, the State may regulate such elections by proper laws." p. 545.

That court stated further:

"Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this State, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed,—including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the policy of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights,—that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the state convention of such party, and cannot, under any circumstances, be conferred upon a state or governmental agency." p. 546. Cf. *Waples v. Marrast*, 108 Tex. 5, 184 S. W. 180.

The Democratic party on May 24, 1932, in a state convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided":

"Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be

eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations."

It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a State from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a State of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendment as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party, not governmental, officers. No appearance for respondents is made in this Court. Arguments presented here by the Attorney General of Texas and the Chairman of the State Democratic Executive Committee of Texas, as amici curiae, urged substantially the same grounds as those advanced by the respondents.

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon v. Herndon*, 273 U. S. 536. At that time, 1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107 (Rev. Stat. 1925) declared "in no event shall a Negro be eligible to participate in a Democratic Party primary election in the State of Texas." Nixon was refused the right to vote in a Democratic primary and brought a suit for damages against the election officers under R.S. §§ 1979 and 2004, the present §§ 43 and 31 of Title 8, U. S. C., respectively. It was urged to this Court that the denial of the franchise to Nixon violated his Constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment and reversed the dismissal of the suit.

The legislature of Texas reenacted the article but gave the State Executive Committee of a party the power to prescribe the qualifications of its members for voting or other participation. This article remains in the statutes. The State Executive Committee of the Democratic party

adopted a resolution that white Democrats and none other might participate in the primaries of that party. Nixon was refused again the privilege of voting in a primary and again brought suit for damages by virtue of § 31, Title 8, U. S. C. This Court again reversed the dismissal of the suit for the reason that the Committee action was deemed to be state action and invalid as discriminatory under the Fourteenth Amendment. The test was said to be whether the Committee operated as representative of the State in the discharge of the State's authority. *Nixon v. Condon*, 286 U. S. 73. The question of the inherent power of a political party in Texas "without restraint by any law to determine its own membership" was left open. *Id.*, 84-85.

In *Grove v. Townsend*, 295 U. S. 45, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from *Nixon v. Condon*, *supra*, in that a state convention of the Democratic party had passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as has been held in the *Condon* case, was action by authority of the State. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the State. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership with which "the State need have no concern," *loc. cit.* at 55, while for a State to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendment.

Since *Grove v. Townsend* and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, *United States v. Classic*, 313 U. S. 299. We there held that § 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, 313 U. S. at 316, 317, "where the primary is by law made an integral part of the election machinery." 313 U. S. at 318. Consequently, in the *Classic* case, we upheld the applicability to frauds in a Louisiana primary of §§ 19 and 20 of the Criminal Code. Thereby corrupt acts of election officers were subjected to Congressional sanctions because that body had power to protect rights of federal suffrage secured by the Constitution in primary as in general elections. 313 U. S. at 323. This decision depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of federal officials. By this decision the doubt as to

whether or not such primaries were a part of "elections" subject to federal control, which had remained unanswered since *Newberry v. United States*, 256 U. S. 232, was erased. The *Nixon Cases* were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process. The exclusion of Negroes from the primaries by action of the State was held invalid under that Amendment. The fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the *Classic* case cuts directly into the rationale of *Grovey v. Townsend*. This latter case was not mentioned in the opinion. *Classic* bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State. When *Grovey v. Townsend* was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. 295 U. S. at 55. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in *Classic* as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey v. Townsend* was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. In again entering upon consideration of the inference to be drawn as to state action from a substantially similar factual situation, it should be noted that *Grovey v. Townsend* upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before, this Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized and the Convention action was unfettered by statutory control. Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas. Other precedents of this Court forbid the abridgement of the right to vote. . . .

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States v. Classic*, 313 U. S. at 314; *Myers v. Ander-*

son, 238 U. S. 368; *Ex parte Yarbrough*, 110 U. S. 651, 663 *et seq.* By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell v. Hill*, *supra*, federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the "supreme Law of the Land." . . . Texas requires electors in a primary to pay a poll tax. Every person who does so pay and who has the qualifications of age and residence is an acceptable voter for the primary. Art. 2955. . . . Texas requires by the law the election of the county officers of a party. These compose the county executive committee. The county chairmen so selected are members of the district executive committee and choose the chairman for the district. Precinct primary election officers are named by the county executive committee. Statutes provide for the election by the voters of precinct delegates to the county convention of a party and the selection of delegates to the district and state conventions by the county convention. The state convention selects the state executive committee. No convention may place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary. Texas thus directs the selection of all party officers.

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made.

The state courts are given exclusive original jurisdiction of contested elections and of mandamus proceedings to compel party officers to perform their statutory duties.

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The plan of the Texas primary follows

substantially that of Louisiana, with the exception that in Louisiana the State pays the cost of the primary while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the State or through state requirements, it is state action which compels. When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn v. United States*, 238 U. S. 347, 362.

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane v. Wilson*, 307 U. S. 268, 275.

The privilege of membership in a party may be, as this Court said in *Grove v. Townsend*, 295 U. S. 45, 55, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State. In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. Here we are applying, contrary to the recent decision in *Grove v. Townsend*, the well-established principle of the Fifteenth Amendment, forbidding the abridgment by a State of a citizen's right to vote. *Grove v. Townsend* is overruled.

Judgment reversed.

50. YOUTH SUFFRAGE

As a rule the minimum age for voting in the United States is twenty-one years. The State of Georgia permits voting at the age of eighteen. Peculiar circumstances in Georgia which influenced the making of this exception may be learned from the following reading which is taken from an article by one of the editors of this volume.¹

GEORGIA LOWERS THE VOTING AGE

In 1943, the State of Georgia lowered the minimum age required for voting to eighteen years. In so doing, Georgia made a change which was significant not only for her own people, but a change which focused national attention upon her as the first of the forty-eight states to set the minimum voting age below twenty-one years. So important is this Georgia departure from tradition, it will be worth while to seek the answers to some questions about it. In the first place, exactly what was the change made in Georgia? Second, why did Georgia lower the minimum voting age? Third, does it seem likely that other states will follow the lead of Georgia, in this particular? These questions will be discussed along with some which are subordinate to them.

What was the change made in Georgia?

On August 3, 1943, voters in Georgia approved an amendment to the state constitution which provided:

Every citizen of this State who is a citizen of the United States, 18 years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people: Provided, that no soldier, sailor, or marine in the military or naval services of the United States shall acquire the rights of an elector by reason of being stationed on duty in this State. (Acts, 1943, p. 39, ratified August 3, 1943).²

The paragraph quoted was inserted in the constitution in place of the old Paragraph 2 of Section 1 of Article 2 of the Constitution of the State of Georgia. The wording of the new paragraph differs from that of the old in only two particulars. First, the word "male" appeared as the second word of the old paragraph, so that it read: "Every male citizen . . ." The Nineteenth Amendment to the Constitution of the United States had the effect of deleting the word "male" from that paragraph of the Constitution of Georgia. The second difference in the wording of the new paragraph was the substitution of "18" for "twenty-one." This is the only significant change. Before the adoption of this amendment, the minimum age for voting in Georgia was twenty-one; now it is eighteen. Young people of both sexes, from eighteen to twenty-one, who qualify as electors, and who register in accordance with law, may now vote in Georgia.

¹ From "Georgia Lowers the Voting Age" by W. B. Stubbs in *Youth Suffrage: The Eighteenth Annual Debate Handbook*, copyright 1944, reprint by permission.

² *Code of Georgia, Annotated, 1943 Cumulative Pocket Part* (Atlanta: The Harrison Company, 1943), par. 2-602.

Qualification as an elector in Georgia may be based upon one of five provisions relating to (1) military service in specified wars, (2) descent from one who rendered such military service, (3) good character and understanding of duties and obligations of citizenship, (4) reading, writing, or understanding and giving a reasonable interpretation of any paragraph of the Constitution of the United States or of Georgia, (5) ownership of certain property. The recent constitutional amendment as to the voting age did not make any change with reference to these bases of qualification.

The 1943 amendment did not make any change as to procedure in registration.¹ Prerequisites for registration are residence "in the State one year next preceding the election, and in the county in which he offers to vote six months next preceding the election," and payment of "all poll taxes that he may have an opportunity of paying agreeably to law."²

Care should be taken to avoid confusion with reference to the poll tax.³ . . .

It should be noted that the lowering of the voting age in Georgia did not carry with it the lowering of the age for holding office. To qualify, in Georgia, for Governor, one must be at least thirty years of age; for State Senator, twenty-five years of age; for Representative in the General Assembly, twenty-one years of age; and, for service as a grand juror, above the age of twenty-one years.

In what elections may Georgia youth vote?

The lowering of the voting age in Georgia gives the qualified young people the privilege of voting not only in local and state primaries and elections but also in elections of those who hold office in the federal government and who are elected by popular vote. "Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate."⁴ It is a basic principle followed in our political life. Even that the federal government does not set up qualifications for voting. Even in the recent, much-discussed Texas primary case, in the Supreme Court of the United States, it was said: "Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government."⁵

¹ In 1944, Georgia passed a law to provide for participation in elections and primaries by men and women in military service, see *Georgia Laws, Extraordinary Session, 1944*, p. 2 ff.

² *Code of Georgia, Annotated*, Book 1 (Atlanta: The Harrison Company, 1936), par. 2-603.

³ Georgia has abolished the poll-tax requirement for voting; see the new Constitution of Georgia, ratified August 7, 1945.

⁴ *Breedlove v. Suttles*, 302 U. S. 277, 283; 82 L. ed. 252, 256.

⁵ *Smith v. Allwright*, 88 L. ed. (Advance Sheets), 701, 705.

Why did Georgia lower the voting age?

During the period in which Georgia was considering and making the change in her minimum voting age, there seemed to be a nation-wide movement for such a change. Bills had been introduced into a total of thirty-one of the state legislatures and also into both of the houses of the Congress of the United States.¹ How did it happen that the advocates of the change were successful only in Georgia?

Perhaps the radio address delivered by Governor Ellis Arnall, of Georgia, on July 31, 1943, will give us a convenient summary of arguments advanced in support of the change. His main points were: (1) "young men and young women are taking their place in this war-shattered, flaming world with intrepid courage, with fervent patriotism and with quiet good sense"; (2) the experience the young men and women will obtain through the extension to them of the right to vote will make them better fitted to serve their country as citizens; (3) "we need the idealism, the candor, the unselfishness of those young people's influence in our public affairs"; (4) by approving such a change, mothers and fathers can show that they "believe in the honor and patriotism of our daughters and the courage and the loyalty of our sons."²

Possibly the strongest argument mentioned may be presented in the terse "fight at eighteen, vote at eighteen." However, Governor Arnall stated that this particular amendment is "close to my heart." It will be worth while to give more detailed attention first to the question: Is the fight-at-eighteen-vote-at-eighteen argument merely sentimental? And, second, to the question: What was the peculiar political situation in Georgia which made youth suffrage so dear to the governor?

Is the fight-at-eighteen-vote-at-eighteen argument merely sentimental?

Is there any basis for connecting the voting age with the fighting age? Why has twenty-one been generally accepted in the United States as the minimum voting age? Perhaps an historical approach will throw some light on these questions.

Much of the law and many of the political institutions of the states in our union came from England. As part of the common law which had been developed in England prior to the settlements in America, many of our states adopted the general rule that full age was reached at twenty-one.

The common law fixed the age of majority at the completion of the twenty-first year, and this rule has generally remained in force throughout the United States. . . . By a somewhat fanciful application of the ancient theory that, since the law cannot conveniently compute the portions of a day, the first and the last day are each to be considered a full day . . . , it has become firmly established in the common law states that a youth becomes of age on the day before the twenty-first anniversary of his birth.³

¹ See "Georgia: Suffrage Jr.," *Time*, August 16, 1943, p. 22; and "Vote at 18," *Newsweek*, August 16, 1943, p. 59.

² *Atlanta Constitution*, August 1, 1943, p. 11-A.

³ 14 *Ruling Case Law*, p. 218, par. 6.

The State of Louisiana was greatly influenced by French law and French political institutions. Louisiana seems to have taken the age of twenty-one as the rule for full age from France rather than from the common law of England.

Living as we do under the régime of the civil law, the provisions of our Civil Code must be consulted before turning to the common-law jurisprudence.

Article 37 of the Revised Civil Code reads as follows: "Minors are those of both sexes, who have not yet attained the age of one and twenty years complete, and they remain under the direction of tutors till that age. When they have attained that age, then they are said to be of full age."¹

The Louisiana court pointed out that the original French text of the quoted article was "transcribed literally from article 388 of the Code Napoleon." The court refused to follow the common law theory that the age of majority is reached the day before the twenty-first anniversary of birth; it insisted on "one and twenty years complete."

In fixing twenty-one years as the age of majority, the French seem to have influenced countries other than Louisiana. For instance, Germany seems to have adopted the rule from France. One authority on the history of German law, writing some years ago, stated that "the term of twenty-one years has attained the widest prevalence in Germany, after having earlier found general recognition in France as a result of the Revolution and the Code Civil, and also recognition within the regions of French law in Germany." An imperial statute of February 17, 1875, seems to have established twenty-one as the age of majority for all Germany.²

Is it possible that there is a common source for the French rule as to full age and the common law rule in England? Where did the French rule originate? Where the English? When the French inaugurated universal or quasi-universal suffrage in 1792, they adopted the age requirement of twenty-one years.³ Under the feudal system, the majority age for boys had been twenty-one; for girls fifteen years.⁴ In the early days suffrage was for males, not for females. Is it the feudal age of majority that has come down to us generally as the minimum voting age to-day?

There seems to be evidence that the twenty-one-year rule of the English common law is related to the feudal system,—to the age of majority for the knight. The English rule was not fixed until some time after William the Conqueror had come from Normandy (France) to England, when judges sent out by successors of William the Conqueror insisted on a uniform rule in all the king's courts throughout England.

Before the royal justices insisted on a common law rule as to attaining full age, different ages were recognized for the ending of minority in different classes of society. It is difficult and dangerous to attempt to

¹ *State ex rel. Fleming v. Joyce et al.*, 49 Southern Reporter, p. 221 (123 La. 637).

² Rudolf Huebner, *A History of Germanic Private Law* (Boston: Little, Brown & Co., 1918), p. 58.

³ Jean Brissaud, *A History of French Public Law* (Boston: Little, Brown & Co., 1915), p. 553, footnote 2.

⁴ *Ibid.*, p. 276, footnote 2.

generalize about the feudal system, but some points about land tenure in England seem reasonably clear. The classes of English society were basically related to the land tenure, or the conditions under which the tenant held his land from the landlord. Some tenants held land by *knight's service*, which required the tenant to furnish a fighting man to his overlord. The knight, the fighting man, came of age at twenty-one. Some tenants held land by *socage* (an old English term, not found in Normandy), which did not call for military service. It seems that this type of tenure was originally associated with peasants. The peasant boy (socman's heir) came of age at fifteen. A third important type of tenure was *tenure in burgage*, which resembled socage in that no military service was required of the tenant, but differed from socage in that the tenant was normally a townsman (burgess) as the name suggests,—a member of a privileged community or of a group that aspired to becoming a municipal corporation. Frequently, the obligation of the burgess to his landlord was a mere money rent, which the tenant might earn in his trade or business. The young burgess came of age when he could measure cloth, count money, and carry on the business of his father.¹

An eminent authority on the history of English law tells us that "gradually the rule of the knight came to be the general rule for all classes of society. Twenty-one comes to be the age of majority for ordinary purposes. The other rules lingered on as customs only; and they were customs which did not meet with much favor at the hands of the royal justice."² Some may think that the adoption of the custom which placed majority at a late age was best because it allowed time for the young man to receive an education or gain more experience before taking on full responsibilities. Perhaps that is the reason for the rule, but it has been suggested that "prolongation of the disabilities and privileges of infancy" was "hastened by the introduction of heavy armour." Also, that "here again we have a good instance of the manner in which the law for the gentry becomes English common law."³

Was the adoption of the rule for a knight's coming of age connected with fighting ability, with strength to carry heavy armour? If so, why should not the age of majority to-day be connected with fighting ability? Was the twenty-one-age rule adopted because, without special consideration to fighting ability, twenty-one is the age when young people are best fitted to begin full participation in life? Why have some countries like the Argentine Republic (in the city of Buenos Aires), Brazil, and Uruguay provided for voting at the age of eighteen?⁴ Do young people mature more rapidly in some climates than in others? Perhaps the rule of ending minority at the age of twenty-one has stood for so long a time in so many

¹ W. S. Holdsworth, *A History of English Law* (Third edition), Vol. III (Boston: Little, Brown & Co., 1927), p. 510; and also Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (Boston: Little, Brown & Co., 1899), Vol. I, pp. 252-296, and Vol. II, pp. 438-439.

² Holdsworth, *op. cit.*, p. 510.

³ Pollock and Maitland, *op. cit.*, Vol. II, p. 438.

⁴ *The Statesman's Year-book*, 1940, pp. 695, 734, and 1361.

countries because it has been found by experience to be a beneficial rule, one which results in the greatest good to society in the long run.

Whatever Georgians might have thought of the connection between fighting and voting, there seems to have been a more important factor in determining the adoption of the amendment as to the voting age. That was the political situation in the state, a peculiar development involving youth, which had played a large part in making Ellis Arnall Governor.

What was the peculiar political situation in Georgia?

The predecessor of Ellis Arnall in the office of Governor of the State of Georgia was Eugene Talmadge. Talmadge had been prominent in political life in Georgia for a number of years. In the term he served as governor just preceding the election of Arnall, Talmadge had so conducted himself that he was called "the most high-handed, low-browed local dictator that U. S. politics has known since the days of the late Huey Long."¹ Any candidate who opposed him was likely to have difficulty in defeating him, but Ellis Arnall succeeded.

In his tough campaign . . . no Arnall supporters were more effective than college students infuriated by the Talmadge purge of the State's universities. Too young to vote, they worked on their parents, hounded local political leaders, burned Gene Talmadge in effigy all over the State. Once elected, Arnall reciprocated by pushing an amendment to the State Constitution that would lower the voting age from 21 to 18. . . .²

A brief account of some of the events which occurred during Talmadge's last term of office may help to clarify the relationship of college students to Arnall. Talmadge's efforts to dictate to all state agencies included an attempt to direct the affairs of the Board of Regents, which had the responsibility of running the state's institutions of higher learning. The climax of Talmadge's interference with the work of the Board of Regents was reached in the Cocking-Pittman "trial" in the state capitol on July 14, 1941.

Talmadge sought the removal from office of Dr. Walter D. Cocking, Dean of the School of Education of the University of Georgia, at Athens, and Dr. Marvin S. Pittman, President of Georgia Teachers College, near Statesboro. On May 30, 1941, Talmadge asked the Board of Regents to dismiss Cocking, but the board refused to do so. Talmadge insisted that the Board of Regents hold a trial of Cocking,—a hearing which consumed five hours on June 16, 1941, and which resulted in the exoneration of Cocking by a vote of eight to seven in the board. After Talmadge had changed the membership of the board by putting off the board three who had voted to clear Cocking and placing on the board three Talmadge friends, the so-called trial of July 14 was held, resulting in a vote of ten to five against Cocking. Pittman, whose trial had been postponed from June

¹ "Exit Gene Talmadge," *Time*, September 21, 1942, pp. 19-20.

² "Georgia: Suffrage Jr.," *Time*, August 16, 1943, p. 22.

16, was also "tried" on July 14, with the same result,—a vote of ten to five against him.

The activities of Talmadge on July 14 in the Cocking-Pittman affair were so openly an insult to justice and so unwarranted an interference in the business of the Board of Regents that there was a loud outcry in the newspapers and citizens became alarmed about the future of education in Georgia.¹

Citizens were not the only ones who became concerned about Georgia's institutions of higher learning. Officers of accrediting associations became concerned and acted. In October, 1941, the Southern University Conference, composed of about forty of the leading colleges and universities in the South, dropped the University of Georgia from its list. Students at the University of Georgia became aroused. They hanged and burned Talmadge in effigy. They organized a caravan of more than a hundred automobiles and conducted it from Athens to Atlanta, where they gave vent to their displeasure on the grounds of the state capitol. So widespread was the interest in these student protests that *Life* and *Time* magazines published pictures of the demonstrations.²

On November 3 and 4, 1941, there met in Atlanta a committee of the Southern Association of Colleges and Secondary Schools to consider the Talmadge interference with the state's institutions of higher learning. So serious was the situation that representatives of several other accrediting agencies sat with the committee of the Southern Association. Among these were President Ray Lyman Wilbur and Dr. William D. Cutter, of the Council on Medical Education; Dean Arthur T. Martin, of the Association of American Law Schools; Dean H. C. Horack, representing the American Bar Association, and President C. C. Sherrod, representing the American Association of Teachers Colleges. The committee of the Southern Association concluded that "the University System of Georgia has been the victim of unprecedented and unjustifiable political interference; that the Governor of the State has violated not only sound educational policy, but proper democratic procedure . . ." At the annual meeting of the Southern Association in December, 1941, ten of Georgia's institutions of higher learning were unanimously suspended.³

Other associations acted from time to time during the next few months. In all, the following loss of standing was suffered as a result of Talmadge's interference: the Southern Association of Colleges and Secondary Schools suspended the University of Georgia (at Athens), the Georgia School of Technology (in Atlanta), Georgia State College for Women (in Milledgeville), Georgia State Womans College (at Valdosta), Georgia Teachers

¹ Ralph McGill (editor of the *Atlanta Constitution*), "It Has Happened Here," *Survey Graphic*, 30:449-53 (Sept., 1941); "Lynching at the Capital: Editorial Leader, the *Atlanta Journal*, Atlanta, Ga., July 16, 1941," *Survey Midmonthly*, 77:240 (Aug., 1941); "A Blow to Education in Georgia," *School and Society*, 54:71-72 (Aug. 2, 1941).

² "Georgia Students 'Burn' Their Governor in Protest of His Academic Meddling," *Life*, October 27, 1941, pp. 43, 44, 46; "Talmadge, Phooey!" *Time*, October 27, 1941, p. 64.

³ "Report on University System of Georgia," *Southern Association Quarterly*, 6:71-74 (Feb., 1942).

College (near Statesboro), Georgia Southwestern College (Americus), Middle Georgia College (Cochran), North Georgia College (Dahlonega), South Georgia College (Douglas), and West Georgia College (Carrollton); the Council on Medical Education and Hospitals of the American Medical Association voted to suspend the University of Georgia School of Medicine (at Augusta); the University of Georgia was dropped by the American Association of University Women, the Association of American Law Schools, the Association of American Universities, the Southern University Conference, the National Association of Collegiate Schools of Business, and the Beta Gamma Sigma commerce fraternity; the Association of American Universities struck the Georgia School of Technology from its approved list; and the American Association of Teachers Colleges dropped Georgia Teachers College and Georgia State College for Women.¹

It can be readily seen that the institutions affected by loss of standing were scattered throughout the state. Organized groups of students covered the state, opposing Talmadge, favoring Arnall. The fact that different accrediting agencies acted at different times tended to keep the difficulties in the headlines of the newspapers and in the minds of the students and the voters. That the voting which decided his fate took place on September 9, 1942, so close to the opening date of colleges, did not help Talmadge.

Arnall was elected, and kept faith with the students. He not only fostered the amendment lowering the voting age, but he also effected a reorganization of the State Board of Regents and the State Board of Education, through two other constitutional amendments. In fact the amendment lowering the voting age was one of twenty-eight amendments to the Constitution of Georgia, all of which were overwhelmingly approved by the voters on August 3, 1943, supporting Arnall's program to redeem the state from the blight of Talmadgism. The reforms of Arnall and the citizens of Georgia brought the state's institutions of higher learning back to good standing.²

Clearly, the peculiar political situation in Georgia, one in which students had so much influence in electing the governor, was an outstanding factor in the lowering of the voting age.

Does it seem likely that other states will follow Georgia's lead?

So short a time has elapsed since the lowering of the voting age that there is not much evidence to guide one who seeks to determine whether or not other states are likely to follow the lead of Georgia in this suffrage change. . . .

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Georgia has lowered the minimum voting age from twenty-one to eighteen years. In addition to the usual arguments which might have in-

¹ "11 University System Units Lose Standing," *Atlanta Constitution*, September 2, 1942, p. 1.

² "Prodigal's Return," *Time*, February 8, 1943, p. 68.

fluenced voters in favoring the change, there was a peculiar political situation in Georgia which had an important effect on the passage of the constitutional amendment. While, at the present time, there is no indication of any organized effort to restore the old minimum of twenty-one, enough time has not elapsed to say whether or not there is justification for the arguments of those who pushed the change. It remains to be seen what the effect of this change will be in the State of Georgia and what influence it will have on the other states in the United States of America.

51. THE FUTURE OF PARTY GOVERNMENT

Government in the United States cannot be understood without some knowledge of the influence and the activities of political parties. Why is it that under the Constitution of 1789 it is likely that there will be only two major political parties in the United States? What happens to third parties? Why are they organized? Can they render service to the country even though they may never elect a candidate? The following excerpts¹ may help answer such questions.

Peter H. Odegard (b. 1901), author of outstanding books in political science, formerly Dwight W. Morrow Professor of Political Science at Amherst College, is now President of Reed College. He has served as assistant to the Secretary of the Treasury of the United States.

E. Allen Helms (b. 1897), author and editor (of the series which includes this volume), is Professor of Political Science at Ohio State University.

WHY A TWO-PARTY SYSTEM?

The President's relation to Congress and the manner of his election help to explain the persistence of the two-party system in the United States. The Constitution requires the successful candidate for the Presidency to secure a clear majority of the electoral vote. With more than two parties of anywhere near equal strength in the country, the possibility of securing such a majority would be extremely small. Three or more parties in the field making serious bids for the Presidency would almost certainly throw the election into the House of Representatives. The election of a single executive with the entire country as a single constituency has enforced a unity, so far as the electoral function of the party is concerned, that is almost unique. Conflicting interests which under another system might emerge as separate parties are compelled to unite for the purpose of electing a President. Indeed, the major parties in the United States may be defined as temporary aggregates of interest groups united for the purpose of selecting public officers.

Numerous theories have been advanced to explain the two-party tradition in the United States and England as contrasted with the multiple-

¹ From *American Politics: A Study in Political Dynamics: Second Edition* by Peter H. Odegard and E. Allen Helms, copyright 1938, 1947 by Harper & Brothers. Courtesy of authors and publisher. The first two excerpts are from Chapter V; the remainder of the reading is from Chapter XXIII. Footnotes are almost entirely omitted.

party system of the Continent. One writer says the two-party system is a sign of political maturity; another, that it reflects on the political level the Anglo-American liking for cooperative sport in which two organized teams contend. Others, like Lord Macaulay, attribute it to subtle psychological influences which *naturally* divide people into two camps—conservatives and liberals, Hamiltonians and Jeffersonians. We cannot concern ourselves here with the validity of these various explanations beyond insisting that whatever of truth they may hold, the form and spirit of party organization depend in large measure upon the structure of the government within which it is compelled to function. "The forms of party institutions in the United States," says Professor Macmahon, "have been shaped largely by the interaction of certain features of governmental structure. . . . The system of separately elected state executives, capped by the Presidency, has disposed political groups toward a two-party alignment."¹

It may be said that under any government where public officials, legislative or executive, are elected from single-member districts there is a strong tendency toward a two-party alignment. This tendency is of course much stronger where a majority is required as in the case of the electoral college. . . .

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THE PARTY SYSTEM IN ENGLAND, FRANCE AND THE UNITED STATES

Under the English parliamentary system the tendency toward factional combination into two major parties arises not only from the election of representatives from single-member districts but also from the necessity of maintaining a government in power. The executive—the Prime Minister and his cabinet—is dependent for its very life upon control of a majority in the legislature, and the life of the legislature in turn depends upon a unified majority in support of the executive. If it be said that the cabinet in England is the creature of Parliament, it is not less true to say that the life of the legislature rests in the hands of the executive. The Prime Minister may, if his legislative proposals are defeated, ask the king to dissolve Parliament. Since the cost of reelection is considerable, members of the House of Commons are loath to break the majority upon which the executive's power rests by voting against the policies it proposes. The iron grip which the cabinet holds over legislation as well as over the organization and procedure of the House of Commons, coupled with this standing threat of dissolution, makes for combination and discipline among the various factions composing political parties. The consequence is that, whereas in the United States alliances made for elective purposes are temporary, in England they must be more or less permanent.

¹ Macmahon, Arthur, "Political Parties—United States," *Encyclopedia of the Social Sciences*, vol. xi, p. 596.

The independence of the executive in this country makes for greater freedom on the part of the party members in the legislature on matters of policy. The impulse toward combination involved in creating and maintaining responsible ministers does not operate. Consequently, the interest groups which compose the party and which coalesce at election time reappear thereafter as legislative blocs and factions. If we were to describe these "blocs" as separate parties, we could speak of a two-party system for the selection of personnel, and a multiple-party or a non-party system for the determination of policy.

The situation in pre-war France differed from that which prevails in England or the United States, although it resembled the latter more than the former. The cabinet was dependent, as in England, upon the support of a working majority in the legislature, but it lacked the English executive's control over legislation and the "big stick" of dissolution. Consequently the combinations formed for the purpose of creating and maintaining a government were relatively impermanent and represented more or less loose alliances rather than the merging of factional interests into a bipartisan alignment of Treasury Bench and Opposition. Cabinets were fragile coalitions of rival groups, not as in England or America within a single party, but representing independent parties. With no fixed term for the legislature, free from fear of dissolution, with the President removed from the arena of partisan conflict, and with control of legislation in the hands of parliamentary commissions, a premium was placed upon multiplicity. Committee assignments and ministerial appointments were made upon the basis of partisanship, and the shuffling of cabinet posts following the collapse of the government opened the way to power for the leaders of party groups. Consequently, there was a strong incentive to maintain intact separate group organization and to vote against the government of the day. . . .

THE FUTURE OF PARTY GOVERNMENT

Politics is the quest for power. It involves a struggle for the right to manage public affairs in a manner favorable to those who succeed in the quest and those whom they represent. This is done by apportioning duties, rights and privileges through laws, ordinances and decrees. This quest for power is pursued by individuals organized as political parties or pressure groups, or both, within the framework of a constitutional structure. When they operate outside or against this framework the political struggle degenerates into revolution. Under such circumstances they become not political parties but rival armies. Bullets are substituted for ballots and the *ultima ratio* becomes not peaceful persuasion and consent but violence.

Democracy, Party Government and Freedom of Association.

In a democratic society the road to power is, theoretically at least, open to all upon equal terms, victory going to that combination most

successful in molding opinion and mobilizing consent in the form of votes. Hence it is that party government and democratic government are for practical purposes synonymous. When any particular party or parties enjoy a privileged position because of discriminatory legal restraints imposed upon their rivals or potential rivals, especially through limitations upon the rights of association and expression, democracy soon dies in dictatorship. When this occurs, the opposition is thrust outside the constitutional framework and has no recourse but resort to violence. Essentially this is what happened in Nazi Germany, Fascist Italy and Communist Russia.

In a society, therefore, which hopes to remain democratic, political parties and pressure groups must be as free as possible from official control. Those legal controls which go beyond insuring honest elections, the fullest possible participation of the voters themselves in party management, and equality of opportunity for all competing combinations, must be regarded with suspicion. Otherwise, regulation tends to transform the party from a voluntary association into an official agency of the state. Pushed to its logical limit this tendency will result in a totalitarian or quasi-totalitarian system. It makes increasingly difficult those necessary realignments within the major parties, resulting from altered social and economic conditions, of their traditional adherents and the infusion of new elements recruited from outside. Even more important, perhaps, is the tendency for legal regimentation of political parties to magnify the obstacles in the path of minor party movements, which, when all is said and done, have been among the most vital and progressive factors in American political development. This is especially true under a political structure such as ours where because of the single-member district scheme of representation, the majority principle in choosing a President, as well as other factors, a two-party system is more or less inevitable. Unless voters can shift their allegiance with reasonable facility among the major parties or challenge their domination by the organization of independent political movements, both major combinations will become inflexible, stagnant and so similar in their structure, composition and objectives as to be virtually indistinguishable. They become little more than political Gold-Dust Twins and the voters' choice is limited to Tweedledee or Tweedledum.

The Wisdom of Tweedledee and Tweedledum.

This fact has been noted by numerous scholars and commentators. "Neither party," wrote James Bryce in *The American Commonwealth* in 1888, "has as a party any clear-cut principles. . . . Both have traditions. Both claim to have tendencies. Both have certain war cries, organizations, interests enlisted in their support. But these interests are, in the main, the interests of getting or keeping the patronage of government." This similarity raises no serious problem so long as it is confined merely to an agreement upon basic economic and constitutional principles such as the

preservation of private property, civil liberties and democratic procedures. Indeed, one may say that unless there is substantial agreement on these fundamentals, orderly, peaceful government will be impossible. In a capitalistic society, supported by an overwhelming majority of the population, it is to be expected that the major parties will be pro-capitalistic, just as in a Socialistic society they would be fundamentally pro-Socialistic. No community can alternately embrace full-blown Socialism and complete *laissez-faire capitalism* without disaster, although, as the victory of the British Labor party in 1944 so clearly demonstrates, alternation between compromises of the two extremes is possible. The future of modern democracy will depend upon the extent to which it affords opportunity for a peaceful—and, one is tempted to say, piecemeal—transition from capitalism to democratic collectivism.

To accomplish this it is vitally necessary that those who challenge the existing order, either wholly or in part, have ample freedom to do so not only as minor parties but as enclaves of pressure and persuasion within the major parties. Only thus can both parties move forward with the times and avoid that fatal cleavage which results in civil war. If, as Professor Laski says, "the business of government is the maximum satisfaction of public demand," political parties, to survive, must reflect and make articulate this demand. When they come to represent an identity of interest which excludes the new voices of social protest their days are numbered. Under such circumstances they tend to represent not conservatism but reaction, and move to protect themselves within an iron ring of legal restrictions or take refuge in the totalitarian practice of actually suppressing their rivals.

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The Life of the Party Depends on Democratic Control.

Political parties, according to Professor Anson Morse, have two major functions, "first, that of making such changes in the public policy as are necessary to bring it into accord with the principles of the party, and second, that of guarding the changes until they are fully accepted or cease to be needed." These two functions, he says, "comprise the whole of a party's mission, and when its mission is fulfilled, the party must die." What Professor Morse seems to overlook is the fact that the party's principles, or *mission*, are not fixed but change from time to time with the changing interests of those who make up its following. Political parties are not immortal, but such is the force of traditional symbolic loyalties that they often survive long after the "historic mission" which called them into being has been achieved, discarded or amended beyond all recognition. This is especially true under a two-party system where both major parties respond to manifold economic and social pressures in an effort to hold their own and win new adherents. When they fail to yield to such pressures through an intransigent adherence to outmoded principles, or seek safety in legal restraints upon those who challenge their supremacy, they court

ultimate dissolution and death. To know when to yield and when to stand firm in the face of insurgency or open revolt is the test of party statesmanship.

Since the Civil War both major parties have been plagued by factionalism having its roots in sectional, economic, ethnic and personal differences rationalized by conflicting political and social theories. On the outer fringes of each have been radical, or quasi-radical, and reactionary wings—the so-called Left and Right. Indeed, these intra-party differences have been more significant than those between the major parties. The rival factions have been held together by compromise and a more or less dry allegiance to and dependence upon the party organization as an electoral device. When these conflicts prove to be irreconcilable within the familiar party structure those on the Left or Right drop away and seek refuge with the opposition or launch new parties. These in turn are alternately reabsorbed and the political “heresies” they espouse today become the “historic principles” of one or both of the major parties tomorrow. This process of reabsorption is facilitated to the extent that party organization is democratic. Otherwise these parties continue an independent course in the hope of some day achieving power in their own right as a major party.

This essentially has been the history of both major and minor parties in the United States. The triumph of business enterprise within the Republican and Democratic organizations has engendered insurgency and revolt among farmers and workers which gave birth to the Granger movement of the 1870's, the Greenback and Populist parties of the 'nineties, the Progressive protests of 1912 and 1924, as well as the Non-Partisan League in North Dakota, the Sinclair Epic movement in California, the American Labor and Liberal parties in New York, the Political Action Committee in 1944 and the Progressive Citizens Committee in 1945. Generally speaking, these movements have had for their objectives not a fundamental reconstruction of the social order but more or less minor reforms of specific grievances. More liberal credit for agriculture, the right of collective bargaining, limitation of immigration, higher wages for labor, regulation of trusts and transportation companies, elevators and other public utilities, income and inheritance taxes, tariff reform, direct election of Senators, woman suffrage, the direct primary and a curb upon judicial power have been their goals. Others, like the Prohibition party, have had even more limited aims. As one by one these reforms have been enacted into law or incorporated into the platforms of the major parties the combinations created to promote them have dwindled or died. Even the Socialist and Communist parties with their more far-reaching programs of social reconstruction have seen plank after plank torn from its context in their platforms and placed upon the statute books or upon the order of the day by those whom they denounce as enemies. Not satisfied with such piecemeal victories, however, they continue their demand for a Socialist commonwealth and denounce all other parties as servitors of capitalism.

These insurgent and rebel movements serve as coefficients of social

instability and as harbingers of social change. When times are reasonably good they cause scarcely a ripple on the calm surface of political conformity. In periods of economic depression they bloom in luxurious profusion, their number and vigor rising at times to cyclonic proportions, indicating the extent of social and political *malaise*. However fantastic or absurd their demands may seem, they serve as a cure for complacency by calling attention to plague spots of poverty, injustice and frustration in what the well-placed and prosperous too often assume is the best of all possible worlds. To attribute these movements, as many conservatives do, to the propaganda of designing "alien" and "un-American" agitators is to confuse effects with causes.

Independent Action Versus "Boring from Within."

Aside from exerting pressure upon public officials after election, there are two ways in which the forces of discontent may become politically articulate. One is to launch an independent party, the other is to exert pressure within one or both of the major parties. The question as to which road to follow admits of no arbitrary answer. Because of difficulties in the way of independent party activity many insurgent leaders prefer to remain within the framework of the major parties. Under the direct primary system, they argue, it is possible for the protestants to nominate their own candidates without sacrificing the psychological advantage of familiar party labels. One important obstacle in the way of such tactics is the fact that in most states participation in the primary is limited to the registered or enrolled members of any given party. While this does not prevent dissenting groups on the party lists "boring from within," it does make difficult the invasion of the primary by any considerable numbers from the outside. In those states where, as in the solid South, a vast majority of the voters is included within a single major party this presents no serious difficulty. But where the discontented elements are divided between Republican and Democratic organizations, they may be unable, under a closed primary system, to muster enough strength in either to control the party machinery or the nominations.

Where the open primary prevails, however, the insurgents may unite for participation in the primary of one or the other party regardless of their past political allegiance. If they are sufficiently numerous to control one party, even under the closed primary, those in the other party who share their grievances and goals may cross over and support the insurgent candidates at the final election even at the cost of being excluded from their own party primary in the future. If, however, the insurgents are defeated in both parties they are faced with a difficult choice. . . .

To work within the old-line parties invariably necessitates compromise with more conservative elements, thus diluting, or even scuttling, the insurgent program. Those who oppose "boring from within" in favor of an independent party line say that it is unnatural, unwise and disastrous for farmer-labor voters, for example, to collaborate with their "natural

enemies," employers, bankers, manufacturers, and so forth, within the Republican and Democratic parties. Whatever gains are made in this way, they say, are won at too high a cost. . . .

Those who argue against independent party action point to the innumerable cases where insurgents, either by capturing one or the other of the major parties or by exerting internal pressure, have succeeded in wringing concessions from them where minor parties have failed. Representatives elected under old party labels are more amenable to pressure if the insurgents, by remaining within the party fold, have aided in their election. They cannot then say as they might to a minor party group: "Why should we give you anything or make any concession to you, since you did nothing to help us?" Obviously this form of pressure politics is likely to be more fruitful in the case of those groups whose objectives are limited and do not depart too far from traditional party principles. It is less so for those who demand fundamental changes in our economic and social system.

Where the objective is limited to one issue, as in the case of prohibition for example, independent party action will be especially ineffective. The Anti-Saloon League by concentrating on a single issue and working through the major parties was able, in a comparatively short time, to outlaw the liquor traffic. The Prohibition party, on the other hand, under the necessity of presenting not only an independent slate of candidates but a comprehensive program embodying other demands, found itself in a constant dilemma. . . .

The question as to whether political protestants should "bore from within" the major parties or strike out on an independent course, in the future as in the past, will be decided *ad hoc*. In some places insurgents will find it best to work within the Democratic party, in other places within the Republican party, and in others the only alternative will be independent party action. Although pressure politics may be more effective in achieving immediate and partial objectives, the educational value of minor party activity cannot be gainsaid. There is no reason why both methods should not be employed. The minor parties may outline a comprehensive goal toward which intra-party pressure and insurgency can move in piecemeal fashion. The former may, in the long run, be more effective in winning the war; the latter, in winning particular battles. Whenever a redoubt of reaction falls under intra-party pressure, whenever we move forward on certain sectors, the outposts of political progress are pushed ahead, and the way is opened for a general advance along the whole line. The forces of social change as a rule follow a zigzag course and rarely if ever move in a straight line.

Difficulties Encountered by a New Political Party.

The way of a new political party in America, even under most favorable auspices, is beset with difficulties, and the going has become increasingly rough as legal control of party machinery and procedure has in-

creased. The definitions of political parties embodied in state election laws make it difficult for independent combinations to get on the ballot. The result is that whereas the major parties appear on the ballot almost automatically, a new party must go through the tortuous procedure of petition. In Ohio, for example, over 200,000 signatures, 15 per cent of the vote at the last preceding election, are required in gubernatorial elections. Since the names of petitioners are not secret, and since those who sign pledge themselves to support the new party's candidates at the election, thousands of persons are undoubtedly dissuaded from signing such petitions by fear of social ostracism, intimidation and reprisal. This is particularly true in the case of more radical organizations like the Socialist and Communist parties. There are other restrictions, too, as in Nevada, where a new party must not only present a petition signed by 5 per cent of the voters but pay a non-returnable filing fee of \$1500.

Not all the states impose such stringent regulations, but everywhere they are considerable. In Nebraska a new party may nominate its candidates in state convention provided not less than 750 delegates attend at the same time that 100 others participate in county conventions. In Wyoming where new party candidates may be nominated in convention or by petition, the party name itself cannot be used on the ballot. It is true that any group may present a presidential candidate, but since a place on the ballot is secured under state law, such a nomination may be little more than an empty gesture.

The single-member district system of representation and the majority requirement for the election of a President militate against minor parties, since, except in a few cities, no provision is made for minority representation. Moreover, the possibility of splitting the independent vote and thus insuring election of the machine candidate causes many voters to stay in line rather than to "throw away" their votes in a hopeless quest. Proportional representation might remedy this, so far as the legislature is concerned, but with consequences not altogether happy. In presidential elections, so long as the majority requirement in the electoral college holds, new parties must either face the discouraging prospect of uniting with one of the two major parties or run the risk of throwing the election into the House of Representatives. Fear of this has undoubtedly played a not unimportant rôle in those elections where a third party, as in the case of the Greenbackers, Populists, Roosevelt and La Follette Progressives, has assumed significant national proportions. There can be no doubt too that thousands of voters in 1932, for example, cast their ballots for Roosevelt rather than for the Socialist or other minor party tickets, on the theory that a vote for Norman Thomas or Earl Browder was in effect a vote for Herbert Hoover, whom they all wished to defeat.

52. (A) POLITICAL COMPROMISE; (B) LEADERSHIP FOR DEMOCRACY

Citizens in a government where a two-party system prevails must face the necessity of political compromise. College students in a two-party, democratic government should be interested in the requisites for political leadership. The following reading, from Eduard Beneš,¹ is thought-provoking on these points. For references by Woodrow Wilson to the party and the national leadership of the President, see reading no. 80, *infra*.

Eduard Beneš was President of Czechoslovakia before World War II. Following the Munich Conference, he resigned (October 5, 1938), and visited England and the United States. From London, in September 1939, he declared that the people of Czechoslovakia were at war with Germany. He again assumed office as President of his country in July 1940, and was confirmed in that office by a Provisional National Assembly October 28, 1945.

(A) POLITICAL COMPROMISE

I have just emphasised the necessity of political compromises. One could justify them theoretically as follows:

In the application of any moral, political, social, or economic principle one must, first of all, answer the following essential question: Should we apply a principle in practical life consistently and without compromise, even so in the democratic states—for instance, Great Britain—there so reducing the principle itself to absurdity? Or must we allow for circumstances and limit its application so that its vitality and its preservation will not be endangered? In other words, should we be guided in practical political life by the principle, *Fiat justitia pereat mundus*, or by the idea that frequently in applying the most important, most far-reaching, and noblest principles in practical politics it is necessary to be content with reasonable compromises which will endure?

This means in practice: Should we, for instance, permit the personal freedom of a single individual in a democracy to endanger the freedom of the other individuals? Should we allow the sovereignty of a single great nation to endanger the sovereignty of a smaller nation? Have we to allow and to apply the self-determination of one nation to such an extent that it completely endangers the self-determination of another nation?

In the field of pure ethics and metaphysics there should not be any disagreement. The majority of moral philosophers actually resolve this conflict between principle and expediency quite clearly and completely in a positive, uncompromising manner: the principles of moral conduct should be applied consistently, completely, and everywhere. In practical life, however, nobody *ever* doubts—in any political camp—that politics by their very essence and by the needs of everyday life require and enforce compromises. This means that the application of every principle in prac-

¹ Eduard Beneš, *Democracy Today and Tomorrow* (Macmillan, 1939), courtesy of The Macmillan Company.

tical political life must be conditioned by the absolutely necessary acceptance of the assumption that the application of the principle in every single concrete instance must not destroy the principle itself in its essence.

This implies, in the question of self-determination, that the Peace Conference could not create new purely national states, that the defining of frontiers in European states—because of the national development of Europe in the Middle Ages and the last three centuries of the modern age—could not be carried out on the basis of the nationalistic principle in all its consequences, and that, therefore, the old and new states had to include racial minorities in their frontiers. There is a large literature on this question, and a discussion of it could be interminable. While I always try to be consistent and to base my policy on principles, I still affirm the necessity of compromise in this question as in others and the impossibility of drawing clear-cut ethnic frontiers in Europe.

(B) LEADERSHIP FOR DEMOCRACY

Speaking of the true democratic conception of politics and of the ideal democratic politician we come naturally to the question of leadership for democracy and to a consideration of what the leader *should be* in democracy. . . .

The matter of leadership in politics is one of the most interesting and, at the same time, one of the most involved and far-reaching questions in political science and in practical political life. In postwar politics, and especially in the political arena of recent years, when such remarkable events have been happening in the world, the question of leaders has been fundamental and decisive in understanding the political history of these years.

In the feudal and monarchical period leadership was based on birth into the aristocratic class and in very large degree on property. Political leaders were born to leadership. They did not attain position by reason of personal merits or achievements. They inherited leadership as they inherited class position and property.

In the modern democratic period the leaders have been elected. But even so in the democratic states—for instance, Great Britain—there are remnants of the ancient aristocratic system and because certain democracies are really and practically only half-democracies, there is a situation in which the leadership is decided not only by election, but also in connection with and as a result of the inheritance of class position and property. Again as an instance, actually you have in England first of all the leadership in the House of Lords still inherited, nominated, and decided in very large degree by birth and property. There is a governing class, the origin of which is class distinction, property, and nomination from the king. In other democracies these remnants of feudalism are not so prevalent—for instance, in France where the Revolution overthrew the

aristocracy. Here election plays a more important and significant role in the creation of leadership.

In the authoritarian states leadership and leaders are created always through revolution. Besides, the conception of "Führer" or of "Duce" is, in national socialism and fascism, based on a special philosophy of the state. Fascism and national socialism first of all accept, as we have seen in the preceding chapter, the conception of the absolutist and almighty state and this "all-might" of the state is personified in the Duce or Führer. According to the theory of these two authoritarian systems the Duce and the Führer are the real expression of the state. The Führer especially—but also the Duce—is a conception to a very large degree mystical and religious, as well as revolutionary. It is, however, true that both of these regimes refuse to accept the conception of the head of the state "by Grace of God." They have a mystical conception of the people and of the nation. They deify the nation; they deify the state; they identify state and nation. And the Duce or Führer is the natural leader as the expression of the nation and of the almighty state, as opposed to parties, classes, and other individuals. As to succession in leadership, they have not yet formulated their theory.

To summarise, the differences between leadership in democracy and authoritarian states are as follows:

Democracy, being a system of applied science, of rationalism, of the equality of man, of discussion, of evolutionary methods of daily politics, of honesty, has the natural inclination to produce leaders who are the expression of analytical science and of reason. They are people who must have a high sense of responsibility; who must carefully weigh and constantly consider public opinion; who are obliged therefore to proceed slowly and with great conscientiousness. Hence they are generally people inclined to close analysis and to profound reasoning. Very often, because of this procedure and the method, the leaders of democracy become very easily people of indecision. Because they must do everything by discussion in Parliament, among the political parties and with their eye on the voters, and their ear to the ground, their position, of course, is much more difficult than that of the leaders in the absolutist or authoritarian states, who are free to make swift and final decisions.

Leaders in authoritarian states—where the state is based on the idea that life is a constant battle and struggle, that the relation between nations and states is a battle, because they accept in daily politics methods of violence and force—such leaders must reflect such characteristics; they must be men who accept the principle that human life is a constant battle, and that the relation between men is a relation of force. They therefore have characters of violence and must be men of action rather than men of reflection. They are generally people who make decisions at once without taking into consideration the advice of others and very often without taking into consideration historical facts and realities of the day. They are generally adventurers without scruples, cynical, ambitious, egocentric,

emotional, and amoral. For this reason the countries which are led by such types of men must—because of the very nature of their regime and of their leadership—finish in catastrophe, generally in war.

Again the leader in democracy is on the other hand a man who first of all must be or should be extremely well educated and informed as to general conditions in his country, and who must be of wide erudition. He must therefore apply all his energies and abilities to the fullest in the pursuit of his official functions. He must be a sort of hero of industry, of honesty, of self-sacrifice and patience, because he must constantly discuss problems as they arise; he must always be prepared for the attacks of his opponents and must steadily undertake by reason and logic to persuade the opposition. He therefore is often exhausted much more rapidly than leaders in the authoritarian states. Leaders in democracy grow old more rapidly. Almost every democratic leader must pass through a period of general unpopularity. The real democratic leader is actually condemned finally to be unpopular and to fall. He is wise if he is conscious of these facts. He must be prepared for unpopularity and eclipse and he must accept all this as his contribution to his state and nation and not consider it as due to ingratitude or as something which is not normal.

The final judgment on both types of leader is made ultimately by history. Consider the famous dictators in history through the lens of history and see what the verdict of history has been!

If you compare what I have said about democratic politics as science and art and what I have said about political leaders, you will understand how—in my conception—the ideal statesman should have all the qualities of the real democratic leader combined with some of the qualities of the authoritarian leader. He must be something more than the man of analysis, of reason, and of science. He must not only be an intellectual—for in the field of politics intellectuals have very often proven to be quite incapable—but must also be a man of decision and of courage. *He should combine in his personality in a very harmonious synthesis a high type of man of great intellectual culture and scientific erudition with keen intuition and instinct, of spirit, of rapid decision and quick action, and of physical and moral courage.*

Such a combination occurs *very rarely in practical political life*—but it does occur. It is a question not only of education, but also of innate qualities and abilities. *For these reasons, leadership, especially in the democracies, will always be a question of good education and of careful selection of leaders.* And it is therefore necessary that the higher types of individuals should become more interested in politics in a democracy. The so-called intellectuals must therefore interest themselves in politics because in the last analysis real leadership can come also in democracy first from their ranks. Leaders emerge, of course, from time to time, directly from the ranks of the people—generally after revolutions or periods of upheaval. But they are leaders who, although they came directly from the people, either are already intellectuals or become intellectuals,

through education and effort, by force of circumstance. In any case, *in modern life and in the democratic states, to engage in politics without very hard intellectual work, without very great erudition, without very high comprehension of all divisions of science, is simply impossible.*

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53. MAJORITY AND MINORITY POLICY COMMITTEES

The extent to which the two-party system has been accepted in the United States is reflected in the following excerpt from Senate Report No. 1011, *Organization of Congress* (79th Congress, 2d Session, March 4, 1946). For other portions of this report see readings nos. 61, 66 and 87, *infra*.

Would the setting up of Policy Committees like those recommended in this excerpt tend to make the two political parties official agents of the state? Would it be more or less difficult for third parties to succeed in getting their innovations adopted by the major parties? Would such committees tend to make the government more or less a servant of the people? Why?

For some recognition by Woodrow Wilson of the need for closer cooperation between Congress and the President, see reading no. 80, *infra*.

Strong recommendations were made to your committee concerning the need for the formal expression within the Congress of the main policies of the majority and minority parties. These representations called for some mechanism which could bring about more party accountability for policies and pledges announced and made in the national platforms of the major political parties.

These recommendations were based on the theory that in a democracy national problems must be handled on a national basis. Only through the expression of the will of the people by their support of political parties on the basis of their platform pledges can the majority will be determined. Likewise the minority viewpoint is also expressed in support of the minority platform.

No one would claim that representative democracy as we know it today could exist without majority and minority parties. The 435 voices of the House and the 96 of the Senate would be a confused babel of conflicting tongues without party machinery. Instead of unorganized mob rule where the strength of varying viewpoints cannot be measured or determined, party government furnishes a tug-of-war in which the direction and strength of opposing viewpoints can be more or less accurately measured and weighed.

Under the American party system there are always two main groups, each checking the other and offering the choice of alternative courses of action. Around these two groups Congressmen can rally and express themselves, helping in party caucuses to determine the policy for their group.

Your committee recognizes the need for freedom of action on the part of the individual Member of Congress and his right to vote at any time against the announced policy of his party. But we feel that if party accountability for policies and pledges is to be achieved, stronger and more formal mechanisms are necessary. The present steering committees, an informal and little-used device, seldom meet and never steer.

We recommend that these be replaced with the formal establishment in the House and the Senate of majority and minority policy committees. The majority policy committees of the two Houses would meet jointly at frequent intervals, as would those of the minority, to formulate the over-all legislative policy of the two parties. The majority policy committee of each House would also hold frequent meetings to consider its role in expediting consideration and passage of matters pledged to the people by their party.

On issues where party policy is involved the decisions of these policy committees would be formally announced in the proceedings of Congress and formal records would be kept of such decisions. No member of either party would be required to follow such announced party policy except as he chose to do so. Each member would be free to vote as he saw fit, but the record of his action would be available to the public as a means of holding both the party and the individual accountable.

1. Creation of Policy Committees

Recommendation: That both the House and the Senate establish formal committees for the determination and expression of majority policy and minority policy. Each of these four committees would be composed of seven members appointed in its entirety at the opening of each new Congress. The majority and minority policy committees in both Houses would be appointed by their respective majority and minority conferences.⁵

We feel that, in the establishment of such policy committees, the Congress chosen at the last general election should be controlling and that the policy-committee membership should therefore be chosen at the beginning of each new Congress. Membership on all policy committees would automatically expire at the close of each Congress.

2. Joint Legislative-Executive Council

Recommendation: That the majority policy committees of the Senate and House serve as a formal council to meet regularly with the Executive, to facilitate the formulation and carrying out of national policy, and to improve relationships between the executive and legislative branches of the Government.⁵

⁵ Mr. Cox regrets that he is unable to join in this recommendation.

In order to narrow the widening gap between the executive and the legislative branches, we recommend that the Senate and House majority policy committees serve also on a formal council to meet at regular intervals with the Executive and with such members of his Cabinet as may be desirable, to consult and collaborate in the formulation and carrying out of national policy and to improve relationships between the two branches of the Government.

Improved understanding of each other's problems will be promoted by consultation before legislation is introduced to carry out pledged party promises and on matters of high administration policy. By giving congressional leaders a part in the formulation of policy, instead of calling upon them to enact programs prepared without their participation, better cooperation can be obtained.

It would also be desirable, we think, to include the minority policy committee from time to time in these joint conferences on broad questions of foreign and domestic policy as a further means of promoting mutual understanding and harmony between the legislature and the Executive.

The Legislative-Executive Council also would enable Congress to approach more directly the solution of difficulties and complaints resulting from administrative action. Formalizing the relationships between these two great branches of the Government, we believe, will improve and strengthen the performance of each.

3. Staffing of Policy Committees

Recommendation: That the majority and minority policy committees of each House receive \$30,000 per year each for the maintenance of a high-grade secretariat to assist in study, analysis, and research on problems involved in policy determination.

With the formal recognition of the policy committees and of their part in formulating majority and minority policy, adequate staffs should be provided by the Congress for their use.

Careful study and research will be needed in order to arrive at sound decisions. To strengthen party machinery without giving it the tools to aid in policy making would be an idle gesture. The better equipped each party is adequately to survey the issues before making its decisions, the better these decisions will be.

Therefore, your committee recommends that the majority and minority policy committees of each House receive \$30,000 per year each for the maintenance of their secretariats. Freedom of choice should be given the policy committees to select their own staffs, but no salary should be paid to any policy committee employee, we think, in excess of \$8,000 per year.

54. WHY THE PRIMARIES ARE MORE IMPORTANT THAN THE GENERAL ELECTION

Emphasis on voting should include voting in the primaries as well as in the general election, as is so well stated by the author of the following selection.¹

Frank R. Kent, the author (b. 1877), served on the staff of the *Baltimore Sun* beginning in 1898. He was managing editor of that newspaper from 1911 to 1921, and has been vice-president of the *Sun* since 1921. He was a political reporter for ten years; Washington correspondent for two years. He has been a writer of a syndicated column on politics appearing in more than 100 papers. His writings include: *The Story of Maryland Politics*, *History of the Democratic Party*, *Political Behavior*, and *Without Gloves*.

Right here is the place to explain exactly why the primaries are so much more vital than the general election to the precinct executive.

The same reasons that make this statement apply to the precinct executive, make it equally apply to the ward executive, the district leader, the boss, the machine as an entirety, and the country as a whole.

Unless these facts are clearly understood at the start, there can be no real grasp of machine power, methods, and control. No political knowledge is worth anything unless they are comprehended.

To think that the general election is more important than the primary election, as most voters do, is to magnify the wrong side of the political picture. It ought to be reversed, and instead of, as now, many more voters voting in the general election than in the primaries, the public interest should be concentrated on the primaries first, and the general election second. As things stand to-day, the popular tendency is to regard primaries as the particular concern of the politicians, and not of real interest to the average voter. The result is that often an absurdly small proportion of the qualified voters participate in the primaries.

There could not be a greater mistake. This lack of appreciation of what the primaries really mean, and the general neglect to participate in them, plays directly into the hands of the machine. It makes it ridiculously easy for the machine, through the precinct executives, to control the situation. It actually permits the machine to run the country.

The reasons this is true are simple enough. Primaries are really the key to politics. There is no way for party candidates to get on the general election ballot except through the primaries. Primaries are the exclusive gate through which all party candidates must pass. Control of that gate in any community means control of the political situation in that community. It makes no difference whether the candidates who pass through that gate are knocked down in the general election or not, the next set of candidates must pass through the primary gate just the same. It ought to be plain, then, that

¹ From the 1940 edition of *The Great Game of Politics* by Frank R. Kent, copy right, 1923, by Doubleday & Company, Inc.

so long as the machine controls the primaries, it is in a position to limit the choice of the voters in the general election to its choice in the primaries. That is the real secret of its power, and, so long as it holds that power, it cannot be put out of business. Defeating its candidates in the general election not only does not break its grip, it often does not make even a dent in it. It can and does continue to function after a general election defeat just as it did before. The only place a machine can be beaten is in the primaries. So long as it can nominate its candidates, so long is it an unbeaten machine. This is a government by parties, and under our system parties are essential to government. In all the states the two big parties—the Democratic and Republican—are recognized by law. These laws provide that these parties shall hold primaries, which are preliminary elections, participated in exclusively by party voters, for the purpose of nominating party candidates. The only way in which candidates may get on the ballot at the general election, other than through direct nomination in the primaries, or through nominations by conventions composed of delegates chosen in the primaries, is by petition signed by a designated number of voters. This gives a candidate a place on the ballot as an “outsider” and is rarely resorted to because of the extremely small chances of success of such candidate. Nothing short of a political tidal wave or revolution can carry an independent candidate to success. He may pull sufficient votes from one side or the other to bring about the defeat of one of the regular party nominees, but his own election is a thing so rare as to be almost negligible.

The fact that I wish to drive home now is that all over the country 99 per cent. of all candidates for all offices are nominated as a result of primaries. The obvious and inescapable deduction is that in 99 per cent. of all elections, the choice of the voters in the general election is limited to the choice of the voters in the primary elections. When the full significance of that statement sinks in, the tremendous importance of the primaries will be better appreciated. It ought to be clear that the man who votes in the general election and not in the primaries loses at least 50 per cent. of the value and effectiveness of his vote as compared to the man who votes in both. Before a candidate for any office can be elected, except the rare independents who escape the primaries and go on the general ballot by petition, he must first be nominated. In 99 per cent. of the cases, nominations are made in the primaries. In 1 per cent. of them they are made by petition. In the face of these facts, it would appear distinctly in the interest of every voter to be a primary election voter. The truth is, however, that the one class that regularly votes in the primaries is the machine voters—and, of course, they control, and always will control, under these conditions.

It is not too much to say that the great bulk of the men holding municipal, state, and federal offices throughout the country to-day were elected or appointed to these offices because of the support of the party organizations or machines. They are exactly the same thing. There are in the United States more than 2,000,000 political jobholders of one kind

or another. They range all the way from the President of the United States to the city street sweeper.

Nearly all of these are strictly organization men. Practically all of them vote strictly party tickets with unvarying regularity. Moreover, through family or other ties, every one of them is able to influence from two to ten votes besides his own. Some of them, of course, control a great many more. Five is the average. This means a powerful army. It is a lot of votes. They are divided between Republicans and Democrats, but the number is great enough to give each an exceedingly formidable force. They constitute the shock troops of the organization—the rank and file of the machines.

The potent thing politically about these machine men is that they vote. That is the real secret of machine power. They do not talk politics and then fail to register. Nor do they register and then fail to vote. Nor do they, when they vote, spoil their ballots. Every election day, regardless of wind or weather, "hell or high water," they march to the polls, cast their straight organization ballots, and they are counted. As voters they are 100 per cent. effective. Besides, they see that the voters they are supposed to influence or control likewise go to the polls. Voting is a business matter with them and they attend to it.

But the overwhelmingly big thing is that they are primary-election voters—not merely general-election voters. No clear comprehension of politics can possibly be had until these basic facts are grasped:

First, all candidates of the two great parties must first be nominated as a result of primaries. There is no other way for them to get on the ballot.

Second, it is more important to the machine to nominate its candidates than to elect them.

Third, that the primaries are the instrument that gives the organization its legal status, and that it is, therefore, the only instrument through which it can be destroyed.

Fourth, that in the general election, the two party machines compete in getting the vote to the polls, and thus largely nullify each other's effectiveness. In the primaries the machines have no organized competition. Hence they become enormously effective and, so long as the average voter fails to participate, are practically invincible.

Fifth, in nearly all states, Republicans are barred from voting in Democratic primaries and Democrats must keep out of Republican primaries, which means that each party machine in the primaries is free from conflict with the other party machine.

Sixth, not only are the nominations made in the primaries, but members of the state central committee, control of which is the key to the whole machine, are elected in the primaries.

This is not the place to go into a detailed account of primary election variations in the different states. Some data concerning exceptions to the general rules here laid down are given [elsewhere], but in the main the statements made in this chapter apply to the country as a whole.

When these things are considered, it ought to be plain why the primaries are so vital to the machine, and why it is a matter of political life and death to the precinct executive to carry his precinct in the primaries. The machine can lose its candidate time after time in the general election without greatly diminishing its strength or loosing the grip of its leaders. Of course, it is disheartening to the rank and file and it greatly lessens the number and quality of the political pies for distribution to the faithful. It could not be kept up too long without causing a revolt in the organization, but, I repeat, the machine cannot be smashed by defeating its candidate at the election.

But if it loses in the primaries, it is out of business. Any organization that cannot carry the primary election is a defunct organization. It either politically disappears or it makes peace and amalgamates with the faction that defeated it. In rare cases it waits for the wind of public sentiment that blew it over to die down, picks up the pieces, and crawls back into the saddle. But no political machine or precinct executive could possibly survive two primary defeats.

Apart from the lack of competition, it must be evident that the reason the machine is so much more potent in the primaries is that the total number of voters is so much smaller. The smaller the vote the more dominant the machine. Only the voters of one party are permitted to vote in that party's primaries. All the members of any political machine are members of one party, and they all vote. Hence, in the primaries the machine polls its full strength, while the number of voters outside of the machine who can vote is very much cut down. It ought to be plain that every party voter outside of the machine who refrains from voting in the primaries adds to the strength of the precinct executive—which means the machine—by just that much.

It also ought to be plain that the man who poses as an independent in politics and declines to affiliate with either party, thus disqualifying himself as a primary voter, has greatly lessened his individual importance as a political factor as well as added to the strength of the machine.

He can be as independent as he pleases in the general election. He can refuse to vote for the party nominees if they do not suit him, but if he does not vote in the primaries, those who do are picking the men for whom he must vote, for or against, in the general election.

Boiled down, it comes to this: so long as the primaries are controlled by machines, the general-election voter, no matter how independent he may be, 99 per cent. of the time is limited in his choice to two machine selections. There is no getting away from that fact.

55. NATIONAL NOMINATING CONVENTIONS

The radio makes it possible today for voters to listen in on proceedings of the national conventions of the major political parties.

The following article ¹ gives good background for radio listeners to keep in mind when they hear what is broadcast from the floor of a convention.

Turner Catledge, the author (b. 1901), is a political writer of long experience. His newspaper connections include work with Mississippi newspapers (1921-1923), the *Memphis Commercial Appeal* (1923-1927), the *Baltimore Sun* (1927-1929). Since 1929, he has been with the *New York Times*, except that he served as chief Washington correspondent (1941-1942) and as editor in chief (1942-1943) of the *Chicago Sun*. January 1, 1945, he became Assistant Managing Editor of the *New York Times*. He had been a Washington correspondent for the *Times* (1930-1936) and chief Washington correspondent for that paper (1936-1941).

IT COULD ONLY HAPPEN HERE

The national party convention is as
American as cornbread and baseball.

By Turner Catledge

Chicago.

A British journalist who witnessed the Republican convention in Chicago which nominated Abraham Lincoln in 1860 sent back a lurid account of the spectacle to his newspaper. He loosed a veritable flood of adjectives to describe the pandemonium which broke when Lincoln's name was placed in nomination, people whooping and yelling and running about like a horde of "Comanches." He implied quite gloomily that any nation dependent upon such a method for selecting candidates for its highest office couldn't have much of a political future.

Eighty years later another international writer, this time an American woman, watched the leaderless free-for-all that nominated Wendell L. Willkie at Philadelphia. Men and women cavorted about the floor, shouting and shoving, acting like nothing civilized. From the galleries came one wave after another of ear-splitting screaming—"We want Willkie! We want Willkie!"

Meanwhile, outside on the streets, newsboys hawked the latest extras. France had fallen and ghostly peril confronted the British Isles. Nazi conquerors had marched into Norway and Denmark and the Low Countries only a few weeks before.

Viewing this scene at Philadelphia against the crimson background of world events, Anne O'Hare McCormick could hardly believe her eyes. To her it was all "incredibly light-hearted and light-minded." The convention hall struck her as a "fiercely lighted, sealed theatrical museum in which an old sound picture is shown again." She reflected on the fact that it couldn't happen anywhere else in the world and noted predictions heard around her in the press gallery that it might never be repeated even in

¹ "It Could Only Happen Here" by Turner Catledge, published in *The New York Times Magazine*, June 25, 1944. Used with permission.

America. But here we go again. War may affect our political conventions, as doubtless it will, but it has not stopped them. In the truest tradition of the circus, the show must go on.

Trains, buses and airplanes already are disgorging upon this city hundreds upon hundreds of gay, prosperous-looking, light-hearted, loud-talking men and women. They're gathering from every State in the Union and from every major territory and possession of the United States except the Japanese-held Philippine Islands.

For the next few days this horde of strangers will invest downtown Chicago. They'll alternately mass themselves in the Stadium, Chicago's giant convention hall, and disperse into the parlors, bedrooms and hideaways of the Stevens, Blackstone, Palmer House and other hotels. For these few days they'll give themselves over to demonstrations and parades, speeches and songs, ranting and panting and viewing with alarm. Out of it all will come later in the week the names of the next Republican candidates for President and Vice President of the United States.

Some three weeks later—around July 19, to be exact—another throng will detrain in the selfsame city. They, too, will come from every Commonwealth that claims membership in the American Republic. They'll have their three or four days of eating and drinking, of orating and conferring and pointing with pride. Out of their performance will come the names of the men whom the Democratic party will present to the electors next November as indispensable to the welfare of the nation and the world.

The delegates who will be gathering in these two conventions were selected in primary elections and conventions in the various States and Territories during the last few months. Among them will be a liberal number of Governors, Senators, Congressmen, State House officials and court house politicians and many who dabble in politics only for the fun of it. In the main they will be a cross-section not of average American life but of the political upper crust.

A goodly portion of the delegates will be "regulars" who have been attending political conventions for years. These will create an air of "old home week" around the hotel lobbies and in the ill-ventilated hideaways. There will be a sprinkling of newcomers, too—of people who have got into the game through bids for office or by opening fat pocketbooks to those who seek these forms of political power. Although not all by any means of the people who count politically will be there, you will nevertheless find in these conventions most of the top-flight political engineers of the country as well as the spokesmen for the others who may not attend in person.

The nominees offered by these two conventions will be the only ones with any practical chance of becoming President and Vice President of the United States for the four-year term beginning next Jan. 20, and, strange as it may seem, the procedure by which they will be selected is wholly without authority in the Federal Constitution or law. It is strictly a product of custom and usage but, none the less, apparently as well fixed in our

system as Congress or the Supreme Court. It is as peculiarly American as baseball or cornbread.

The convention system was first devised by Andrew Jackson to nominate his running mate in 1832. He used it to break the domination of the old Congressional caucus which, in the absence of any constitutional provisions, had taken to itself the duty of handing down the names from whom the people must choose.

When "Old Hickory" thus snatched from Senators and Congressmen the power to select Presidential candidates, whatever decorum there was in the nominating process must have been left on Capitol Hill. For when one speaks of a party convention today as a "show" one is simply using the word which later history has made the most apt.

From the time the first delegates, other politicians, newspaper and radio men and observers begin to arrive in the convention city until the last parade around the hall for the successful nominee, it is on the surface truly a show in the broadest and narrowest senses of the word. The actors are headliners and most of the main parts are usually well assigned in advance.

There is always the keynoter, that highly oratorical gentleman who is expected to inspire party workers to victorious endeavor while walking a tightwire between contesting candidates. There is the permanent chairman, who usually makes a speech himself but whose principal function is to preside over the session and, if need be, shove undesirable dissenters off the platform. There are the committees—the credentials committee, which determines who is to be seated; the rules committee, which figures out how the performance may be run most smoothly; the arrangements committee, which tries to see to it that everyone has a place to sleep and eat and is otherwise accommodated.

In a category all its own is the resolutions committee, whose members labor late and long in stuffy rooms trying to piece together a platform of ponderous compromises, specifically designed to offend the fewest and attract the most voters in the coming election.

Conventions of late years have been so well ordered or controlled, either by dominant persons operating unilaterally or through "deals" worked out at the convention city, that newspaper men can know what is going on by keeping in touch with not more than a dozen persons. An incumbent President almost always dominates the convention of his party, especially if he is a candidate for renomination. The prospect for the coming Democratic meeting, therefore, is that Mr. Roosevelt will write the result in every important particular, acting through National Chairman Robert E. Hannegan or such others as he may designate as his spokesmen. He did it in 1940 and 1936.

For a party out of power, control over the convention is usually established by a fusion of cliques worked out in that famous institution "the smoke-filled room"—that is, unless some person, perhaps a prospective nominee, rises quickly above everyone else and takes command. The forces

of Alf M. Landon were thus enabled to take over the Republican convention at Cleveland in 1936. An exception came in 1940 when the last-minute drive of Mr. Willkie shattered all previously laid lines of control and the old-line leaders were left standing bewildered and humiliated about the great hall.

Present indications point to the probability that sponsors of Governor Dewey of New York will assert authority over this year's Republican convention. That will happen unless the "Stop Dewey" movement centering around Gov. John W. Bricker of Ohio turns out more successfully than is generally predicted at this writing.

The "smoke-filled room" is usually fittingly associated with any convention that is highly controlled from the outside, such as the Democratic meeting in 1940, or any convention the outcome of which is the result of political bargaining, such as the Chicago convention which first nominated Mr. Roosevelt in 1932 and the Republican convention which selected Warren G. Harding in 1920.

In 1940, when the Democrats gathered in Chicago, they did not have the official answer to the all-important question of whether Mr. Roosevelt would accept the third-term "draft." Consequently several other Democratic hopefuls were on hand either in person or by representation.

James A. Farley, who opposed a third term and hoped for the honor himself, trotted about the lobbies chatting with friends, slapping delegates on the back, calling each by name. The "2 per cent" squad of former Gov. Paul V. McNutt of Indiana was lavishly set up at the best available hotel. The roo-toot-tootin' Texas forces of Vice President John Nance Garner were installed in another house, with bar, cowboy greeter and all the trappings.

The convention had held two formal sessions before any word came from the President. Finally it arrived. A hush fell over the Stadium as the temporary chairman read the telegram. On its face it was rather startling. The President released all the delegates pledged to him in State primaries and conventions. He wanted the convention to be on its own.

The message looked at first like a fade-out for the President, but the convention management, set up largely under "draft-Roosevelt" auspices, knew what was between the lines. Within two minutes the floor manager of the "draft," the then Senator James F. Byrnes, was on the radio saying that the message meant that Mr. Roosevelt was a receptive candidate. A voice over the loudspeaker boomed out the call for a Roosevelt parade, and a "draft" demonstration was on within the twinkle of an eye. The voice which kept calling States into line until the whole hall was moving in one massive parade was the voice of Mayor Edward J. Kelly's Superintendent of Sewers. Mr. Roosevelt was renominated the next day on the first ballot.

The basic strategy by which the President's "draft" was accomplished had been worked out months in advance—much of it probably in the White House itself. Tactics at the convention were directed from a room

at the Blackstone Hotel, where the President's personal spokesman, Harry L. Hopkins, kept almost constant telephonic contact with the Executive Mansion in Washington. A veteran bellboy said it was the same room in which the nomination of Warren G. Harding was negotiated in 1920.

Mr. Roosevelt undoubtedly would have been renominated anyway. Indeed, the last-hour manipulations appeared clumsy and unnecessary in the light of his popular support in the country as reflected among the delegates. Nevertheless, the convention tactics, as well as the previous strategy, brought the "smoke-filled room" obviously into play and it was most definitely pronounced the next day, when Secretary of Agriculture Henry A. Wallace was named the candidate for Vice President.

The previously most celebrated case of "smoke-filled room" nomination was that of Mr. Harding. A deadlock developed among leading candidates early in the voting and continued for eight ballots. Certain leaders then retired to a room, in the same Blackstone Hotel, and when the next roll was called Mr. Harding, a minor contender until then, jumped into the lead and won out on the following ballot.

The nomination of Mr. Roosevelt in 1932 was brought about by a hotel-room trade between his supporters and those of Speaker Garner of the House, out of which the latter salvaged the Vice Presidential nomination. Mr. Roosevelt had failed of the necessary two-thirds majority on the early balloting and was in peril of starting that downward glide which spelled doom for Mr. Dewey in 1940, and which all convention candidates dread.

Mr. Farley, manager for Mr. Roosevelt, immediately convened a "smoke-filled room." Telephone calls went out to Mr. Garner and to William Randolph Hearst, the dominant leaders of the largest bloc of votes. Meanwhile Senator Pat Harrison was called out of bed to run to the convention hall and keep Mississippi in line for one more vote, for its delegation was the one threatening to start the Roosevelt slide. Senator Harrison was still fastening on his clothes when he walked into the Stadium, but he held the line for that canceled vote. Meanwhile the deal was accomplished and Mr. Roosevelt became the nominee—and President.

However far such tactics may have taken party conventions from the principles of democratic procedure, the organisms of democracy have remained. The delegates still represent all parts of the nation and its principal territories and possessions, and are the ready instruments through which the desires of these communities can be registered.

Therefore the people do not necessarily have to tolerate abuse of the convention mechanism. Regardless of how great the control over any convention may be, a factor that sustains interest and suspense is the lurking possibility of a stampede, such as happened at the Republican convention in 1940.

Despite the contentions of opponents of Mr. Willkie that the 1940 Republican meeting was bluffed or rigged by Wall Street, the fact is that

the convention got completely out of the hands of the old party leaders and went to the extreme of nominating a former Democrat for President.

Few people were more ignorant of convention tactics than Mr. Willkie was when he arrived at Philadelphia. On the Saturday night before he was nominated I visited him, in company with Arthur Krock, at his hotel room. His quarters were none too good. His candidacy had not been taken very seriously until then and the better hotel suites had been assigned to others—Dewey, Taft, Gannett—who were thought to have some chance of success. When we asked whom he had selected as his floor manager Mr. Willkie replied, "What's a floor manager?"

When the nominating time came, however, Mr. Willkie had a complete staff of floor managers, headed by Governors Stassen of Minnesota and Baldwin of Connecticut. He had learned fast. Moreover, in the intervening time a ferment had started among the delegates and the Willkie stampede was poised to go. Near the end he had his pick of floor managers.

Influences which play on convention delegates are as often hidden as they are revealed. Gallery demonstrations sway them only in rare instances. In the 1912 convention here in Chicago the galleries went wild for Theodore Roosevelt, but the delegates dutifully renominated President William Howard Taft. In the 1920 GOP gathering in the same city the spectators yelled themselves to exhaustion for Herbert Hoover, but he got only eight votes. In 1932 the Democratic convention finally named Franklin D. Roosevelt after the Roosevelt-Garner-Hearst trade, but came nowhere near naming the gallery favorite, Alfred E. Smith.

The rank and file of delegates are influenced more by their leaders than by anything else. Many delegates operate under the "unit" rule—whereby all members vote as the majority rules—which usually enables the leaders to keep an effective hand. The leaders, in turn, are moved more by the practical considerations of politics—trades, "understandings," the desire to take part in selecting a winner—than by any high principles enunciated by candidates or speakers. For a convention to be stampeded by a speech, such as was done by William Jennings Bryan's "Cross of Gold" oration in 1896, happens but once in several generations.

The primary job of every convention is to pick a winner, not to enunciate any great principle of government. Delegates often, therefore, submit rather easily to compromises on candidates and platforms, all in the interest of party unity. The penalties for doing otherwise are too well established in precedent to allow much argument about them. As late as 1924, for instance, the Democrats threw away an excellent chance to win the November election when, in the New York convention, the forces of Mr. Smith and William G. McAdoo engaged in a cat-and-dog fight.

In the Republican convention of 1932 spokesmen for President Hoover were in control down to the dotting of the last "i" and the crossing of the last "t". Even though many party leaders foresaw the anti-Hoover deluge that was to come in the fall election, they knew that to attempt to nominate another would make matters worse.

Mr. Hoover's control was quite adequately demonstrated when another candidate before the convention, former Senator Joseph I. France of Maryland, attempted to gain the rostrum and withdraw in favor of former President Coolidge, who still was the most popular Republican in the country. The first response to Dr. France's efforts was from a group of strong-arm men, who dragged him from the stage.

A good example of the spirit of compromise was seen in the Democratic convention in the same year, over the prohibition plank in the platform. A determined group, led by spokesmen for Alfred E. Smith and Gov. Albert C. Ritchie of Maryland, got control of the resolutions committee and shoved through an all-out wet plank, opposed by the pro-Roosevelt group headed by the then Senator Cordell Hull of Tennessee. The Texas delegation voted to support Mr. Hull in resisting the wet declaration on the floor, and dispatched Maury Hughes, Lone Star lawyer, to the platform, to state Texas' position in favor of the Hull plank as only he could state it.

Mr. Hughes had started his speech, saying something about the "solemn obligation" of the convention to protect the homes and firesides of the country, when the chairman interrupted to call for order. The disorder, oddly enough, was down in the Texas delegation, where a caucus was in progress. Just as Mr. Hughes started to resume—to make his plea against an "unbridled liquor traffic"—a Texas delegate called:

"Wait a minute, Maury, we've switched," the delegate shouted. "Don't do it, Maury; we've gone over by one vote."

The speaker never lost his stride, as he, too, reversed course and proceeded to make one of the most eloquent pleas for individual liberty—for the wet plank—that was heard in the whole debate.

That the war and conditions incident to it will have a tremendous effect upon the conventions this year no one doubts. Under conditions as they are today, and particularly as the political situation has developed in each party, one feels safe in predicting that both meetings will be highly controlled and that drama will be confined to phases less important than the nominations themselves.

But nobody will try to throttle the oratory, no one will attempt to curb criticism of the Administration or any of its works that opponents want to question. Nobody will censor reports of the meetings.

It would serve no point to make further predictions as to what might happen at the great party meetings here in Chicago. It is sufficient—because it is so highly significant in this year of the "Tyrants' War"—to say that the meetings will take place; that they still can happen here.

X

Public Opinion, Pressure Groups, and Propaganda



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IF FREEDOM to criticize the government, the men holding office, and those seeking office, is of the essence of democratic government. Intelligent citizens familiarize themselves with methods and devices frequently used to influence public opinion and to exert pressure on public officials. This chapter may serve as an introduction to a study of public opinion, pressure groups, and propaganda.

PUBLIC OPINION, PRESSURE GROUPS, AND PROPAGANDA



56. FREEDOM TO CRITICIZE

A. Freedom of Press

The importance, in a representative government, of the free use of newspapers to criticize the conduct of governmental officials and to mold public opinion for the improvement of government is recognized in the case of *Near v. Minnesota*, 283 U. S. 697 (1931), from the report of which the following reading is taken.

See reading no. 46, *supra*, for other consideration of freedom of speech and freedom of press.

Mr. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Chapter 285 of the Session Laws of Minnesota for the year 1925 provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical." Section one of the Act is as follows:

"Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation.

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable

ends and in such actions the plaintiff shall not have the right to report (*sic*) to issues or editions of periodicals taking place more than three months before the commencement of the action."

Section two provides that whenever any such nuisance is committed or exists, . . . Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted. . . .

The action, by section three, is to be "governed by the practice and procedure applicable to civil actions for injunctions," and after trial the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation and, "in and by such judgment, such nuisance may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than \$1,000 or by imprisonment in the county jail for not more than twelve months.

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a "malicious, scandalous and defamatory newspaper, magazine and periodical," known as "The Saturday Press," published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical which were "largely devoted to malicious, scandalous and defamatory articles" concerning Charles G. Davis, Frank W. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the Grand Jury of Hennepin County impaneled in November, 1927, and then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank W. Brunskill was its Chief of Police, and that Floyd B. Olson (the relator in this action) was County Attorney.

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an

attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

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The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and on this demurrer challenged the constitutionality of the statute. The District Court overruled the demurrer and certified the question of constitutionality to the Supreme Court of the State. The Supreme Court sustained the statute (174 Minn. 457), and it is conceded by the appellee that the Act was thus held to be valid over the objection that it violated not only the state constitution but also the Fourteenth Amendment of the Constitution of the United States.

Thereupon, the defendant Near, the present appellant, answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. . . .

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This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. . . . Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

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First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action

there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the state of malice in fact as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense, not of the truth alone, but only that the truth was published with good motives and for justifiable ends. It is apparent that under the statute the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words: "There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked nor to punish the wrongdoer. It is for the protection of the public welfare."

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges by their very nature create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance, does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities

to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the manifest inference is that, at least with respect to a new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and

disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." 4 Bl. Com. 151, 152; see Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, "the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543. This Court said, in *Patterson v. Colorado*, 205 U. S. 454, 462: "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314; *Respublica v. Oswald*, 1 Dallas 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding*, *ubi sup.*; 4 Bl. Com. 150."

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"; and that "the liberty of the press might

be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson v. Colorado*, *supra*; 205 U. S. 454; *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419. In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 439." *Schenck v. United States*, *supra*. These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The

conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration. That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. As was said by Chief Justice Parker, in *Commonwealth v. Blanding*, 3 Pick. 304, 313, with respect to the constitution of Massachusetts: "Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse." In the letter sent by the Continental Congress (October 26, 1774) to the Inhabitants of Quebec, referring to the "five great rights" it was said: "The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions:

"In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confedera-

tion? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

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The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous

restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth. *Patterson v. Colorado*, *supra*.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. "To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct." There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung v. Nolan*, 89 N. J. Eq. 387, 388; 105 Atl. 72: "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited." The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

Judgment reversed.

Mr. Justice Butler, dissenting:

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing

and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.

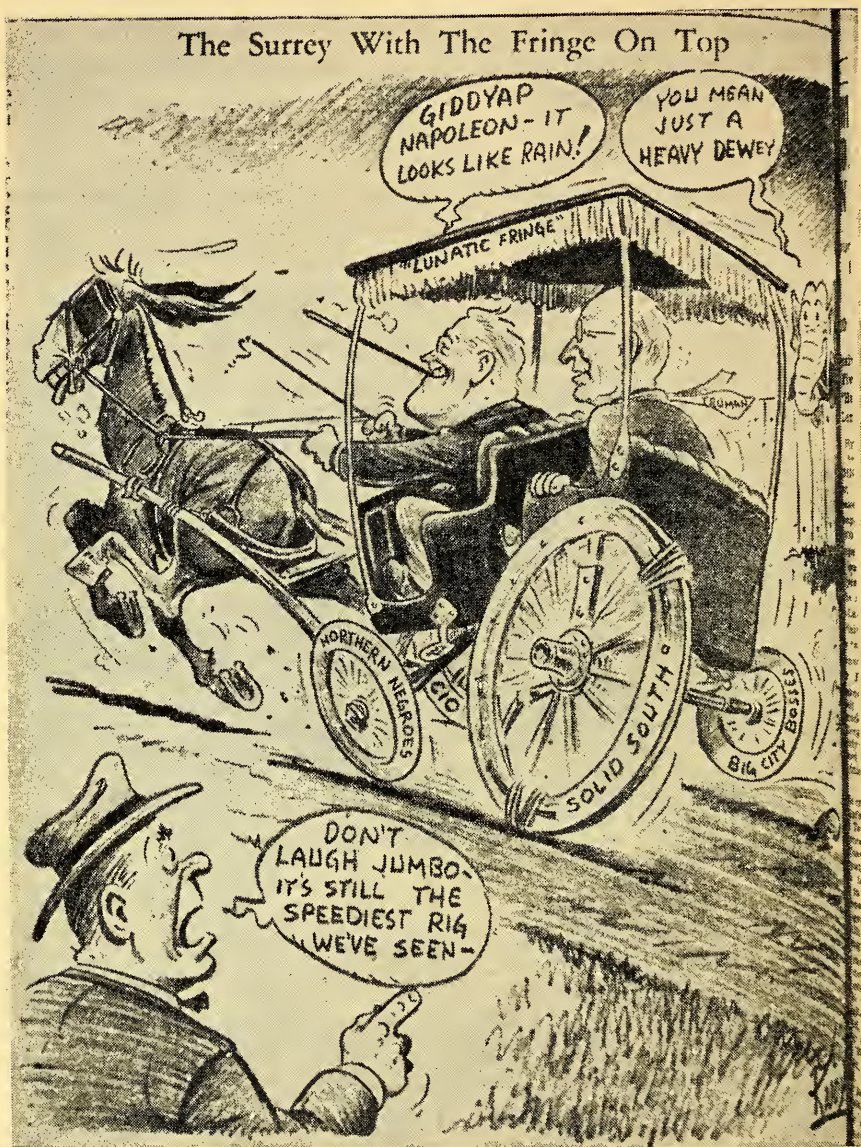
Mr. Justice Van Devanter, Mr. Justice McReynolds, and Mr. Justice Sutherland concur in this opinion.

B. Criticism Symbolized in Cartoons



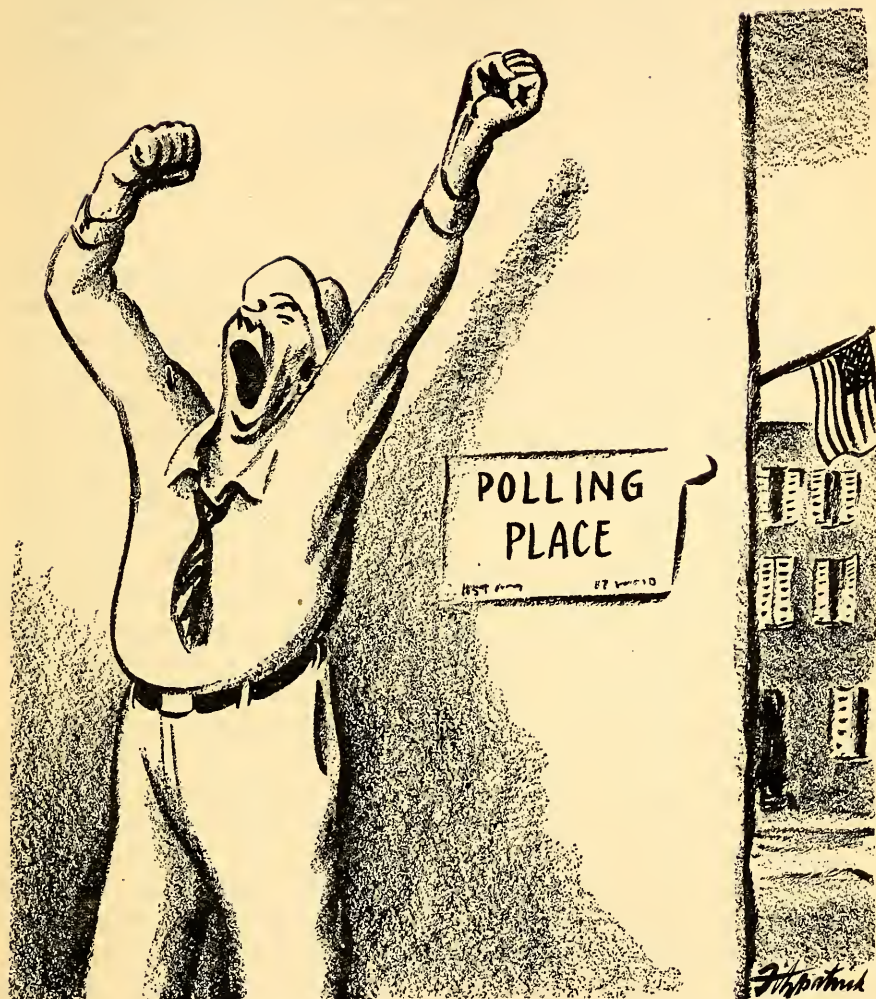
ALEXANDER

IN PHILADELPHIA EVENING BULLETIN, JUNE 30, 1944
[Reprinted by kind permission of the *Philadelphia Evening Bulletin*]



KNOX

IN MEMPHIS COMMERCIAL APPEAL, JULY 23, 1944
[Reprinted by kind permission of *The Commercial Appeal*]



FITZPATRICK

IN *ST. LOUIS POST-DISPATCH*, AUGUST 6, 1946
[Reprinted by kind permission of the *St. Louis Post-Dispatch*]

57. EARLY RECOGNITION OF PRESSURE GROUPS
OR FACTIONS

A classic discussion of the problem of how to handle pressure groups—"factions"—is found in *The Federalist*, No. 10, by James Madison, published in the *New York Daily Advertiser*, November 22, 1787. The text of this writing, below, is taken from the Jacob Gideon, Junior, edition, printed in 1826 by Glazier and Company of Hallowell, Maine.¹

THE FEDERALIST

No. X

By James Madison.

AMONG the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion, introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favourite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labour, have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly,

¹ For Numbers 9, 15, and 39 of *The Federalist*, see readings 22, 23, and 24, *supra*.

effects of the unsteadiness and injustice, with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: The one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: The one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said, than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment, without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable, as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to an uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders, ambitiously contending for preeminence and power; or to persons of other descriptions, whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for their common good. So strong is this propensity of mankind, to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of

factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of government.

No man is allowed to be a judge in his own cause; because his interest will certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? and what are the different classes of legislators, but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side, and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction, must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes; and probably by neither with a sole regard to justice and the public good. The apportionment of taxes, on the various descriptions of property, is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act, in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice. Every shilling, with which they overburden the inferior number, is a shilling saved to their own pockets.

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.

The inference to which we are brought is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views, by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under

the forms of the constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add, that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long laboured, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority, at the same time, must be prevented; or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know, that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together; that is, in proportion as their efficacy becomes needful.

From this view of the subject, it may be concluded, that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure from the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert, results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have, in general, been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the union.

The two great points of difference, between a democracy and a republic, are, first, the delegation of the government, in the latter, to a small number of citizens selected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose. On the other hand the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people. The question resulting is, whether small or extensive republics are most favourable to the election of proper guardians of the public weal; and it is clearly decided in favour of the latter by two obvious considerations.

In the first place, it is to be remarked, that however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the constituents, and being proportionally greatest in the small republic, it follows, that if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit, and the most diffusive and established characters.

It must be confessed, that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the state legislatures.

The other point of difference is, the greater number of citizens, and extent of territory, which may be brought within the compass of republican, than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the dis-

tinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked, that where there is a consciousness of unjust or dishonourable purposes, communication is always checked by distrust, in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage, which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic . . . is enjoyed by the union over the states composing it. Does this advantage consist in the substitution of representatives, whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice? It will not be denied, that the representation of the union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties, comprised within the union, increase this security. Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular states, but will be unable to spread a general conflagration through the other states: a religious sect may degenerate into a political faction in a part of the confederacy; but the variety of sects dispersed over the entire face of it, must secure the national councils against any danger from that source: a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the union, than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire state.

In the extent and proper structure of the union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit, and supporting the character of federalists.

PUBLIUS.

58 MODERN MASS COMMUNICATION

Scientific developments since the time of Madison have placed in the hands of propagandists and pressure groups means of communicating with masses of people which make the problem of handling pressure groups much greater than it was when the Constitution of the United States was adopted, as will be appreciated after reading the following article.¹

The author, Malcolm M. Willey (b. 1897), is Vice-President of Academic Administration at the University of Minnesota. He has taught Sociology at Dartmouth and at the University of Minnesota. His writings include: *The Country Newspaper, Communication Agencies and Social Life* (with S. A. Rice), and *The Newspaper in the Contemporary Scene* (with Ralph D. Casey).

COMMUNICATION AGENCIES AND THE VOLUME OF PROPAGANDA

By Malcolm M. Willey

The Subject of Propaganda can be fully comprehended only when it is understood that in the past thirty years inventions have occurred that have created, in one respect at least, a new social environment. Propaganda itself is nothing new; it is the development of means for its dissemination in a volume and under conditions hitherto unknown, that has served to focus attention on the subject. The history of the rise to prominence in modern social life of propaganda cannot be dissociated from the history of modern mass communication and of the agencies that have made it possible. It is the purpose of this paper to emphasize that mass communication is a reality, and to suggest some of the problems occasioned by that fact.

The term "propaganda" has acquired a connotation that renders its use particularly difficult. In popular usage and in some technical material, invidious meanings are associated with the word. Its untoward aspects are emphasized. It is not the intention here to enter a discussion of definitions, but it is necessary to point out that not all propaganda is vicious or unjustified. It would perhaps be less confusing to drop the word, and to use instead the term "mass communication," since propaganda, regardless of definition, must be regarded as a special form of mass communication.

MEDIA OF MASS COMMUNICATION

Mass communication is characterized by the possibility of establishing contacts with large numbers of people simultaneously or virtually simultaneously, and from one or a few central points of stimulation. Some

¹ From "Communication Agencies and the Volume of Propaganda" by Malcolm M. Willey, *The Annals of the American Academy of Political and Social Science*, Vol. 179 (May 1935); courtesy of the American Academy.

degree of mass communication has always existed. In earlier historical periods it was achieved through physical assembly, and with the printed page—especially the newspaper. In these earlier days its effectiveness was narrowly limited, and direct contact beyond the confines of one audience in one community was virtually impossible—in fact, was partially achieved only through limited circulation of the then existing newspapers, periodicals, and pamphlets. The uniqueness of present-day mass communication is in the fact that with the use of mechanical devices the size of the audience is almost unlimited, and physical assemblage is no longer essential.

In the development of modern mass communication the newspaper and periodical, the motion picture, and the radio are basic, but these three are supplemented by many other media of communication. The wire communication devices in general (telegraph and telephone), the railroad (whereby mail and printed matter is distributed), motor vehicles (also distributing printed matter, as well as facilitating the circulation of human beings), and the various uses of the printing press (in addition to newspaper and periodical uses) are all a part of mass communication. Without the basic three, however, mass communication on its present scale would be inconceivable. The history of the newspaper, the motion picture, and the radio have been traced elsewhere, and the data of their growth and utilization have been presented.¹

It is not the development and utilization of the agencies separately that challenges attention. It is interesting to know that on January 1, 1935 there were 385 morning newspapers in the United States and 1,544 evening papers—a total of 1,929, with an aggregate circulation of 36,709,000 copies daily. There were also 505 Sunday editions, with a circulation of 26,545,000 copies. Circulations showed an upturn in 1934 for the first time in several years.² This daily volume of newspaper material needs to be considered in conjunction with the tendency toward greater concentration of ownership of newspaper properties on the one hand and standardization of content on the other. It is also interesting that all evidence indicates more widespread ownership of radio broadcasting sets, as well as an increase in the daily time devoted to their use. On July 11, 1934 there were 592 broadcasting stations; these, like the newspapers, are tending to concentrate into chains, with a consequent limitation of program choice.³ Finally, it is well to know that 100,000,000 people attend motion picture performances in this country each week.

But it is in their development into a communication network blanketing the entire country that the agencies of mass communication have significant relationship to the subject of propaganda. It is this network, this

¹ See Malcolm M. Willey and Stuart A. Rice, *Communication Agencies and Social Life*, New York: McGraw-Hill Book Co., 1933. Especially Part III.

² *Editor & Publisher*, 67: 11, 1935.

³ The data, with some discussion of their significance, are given in a paper by the author, "The Rôle of Radio in the New Social Order," forthcoming in *Publication of the American Sociological Society*, 1934, containing papers and proceedings of the December 1934 meeting.

integration, that distinguishes mass communication in 1935 from that of any earlier date.

DISTINGUISHING CHARACTERISTICS

Although the attempt to influence the ideas and attitudes of individuals is not recent, certain characteristics of modern mass communication do stand out and distinguish it from earlier propaganda activities:

1. *Through supplementation made possible by the new mechanical media, there is an intensification of stimulation.* Repetition is an important factor in developing social attitudes. Speaking figuratively, Walter Lippmann has pointed out that an individual's social behavior is conditioned by the "pictures in the head," most of which become highly stereotyped. With much the same point in mind, Charles H. Judd has analyzed human social behavior in terms of "expectations"—those modes of behavior which the individual expects to follow, and expects others to follow, in any given situation. To Judd, the expectations are the subjective aspect of the folkways and mores.⁴

The imperativeness of "pictures in the head" or of the "expectations" is in part a consequence of constant repetition of stimuli whereby their strength is originally built up. A multiplication of the media of communication facilitates repetition of stimuli on the part of those controlling such media. To the personal appeal and the printed page of an earlier day are now added motion picture, radio, and others—and the volume of material disseminated by these has grown fabulously.

The effect of constant repetition is enhanced when there is, in addition, a reinforcement of stimuli derived from awareness that others are sharing one's own stereotypes and expectations. An individual may be moved to action through repetition, as, for example, in advertising; but his action is made more certain if he is made to realize that thousands, even millions, of others are thinking and feeling as he himself does. Herein lies the importance of the contemporary communication network; it not only carries its symbols to the individual, it also impresses upon him a sense of numbers. A consciousness of the existence of what Franklin Giddings termed "like response to like stimulus" is an energizing factor in inducing concerted response. The twentieth-century mass communication network makes repetition and reinforcement possible on a scale so widespread that for all practical purposes it creates a social condition or environment that differs in kind, rather than in degree, from the condition prevailing prior to its development.

2. *There is an increase in the spheres of life that are subject to the influences of mass communication.* Stated more narrowly, propagandists are today concerned with a wider range of attitudes and interests than hitherto. This hypothesis has never been subjected to careful research, but its validity is suggested in many ways. Before me, for example, is a

⁴ For his analysis see *The Psychology of Social Institutions*.

copy of a paper published in Norwich, Connecticut, in 1815. A simple count of the number of different topics contained in it reveals far fewer than in a modern newspaper. Furthermore, most of the items are statements of fact—deaths, births, ship arrivals, and so forth. Politics and religion were two fields in which, judged by this newspaper, there was clearly material of a propagandist nature. The advertising matter consisted largely of announcements telling where specific goods and services could be had, rather than “selling talks” designed to create an interest in these goods and services.

In this early Connecticut community, there may have been propaganda through “whispering campaigns,” in the Sunday school lesson, or in the town meeting; this would not show, of course, in the columns of the newspaper. The net impression, however, is a somewhat limited field within which propaganda activities were carried on.

The contrast with a newspaper of today is sharp, for analysis of the current news columns reveals a vast quantity of material in many fields, which is published because some one has made effort to see that it is published. Furthermore, today not only the newspaper but all of the related media are spreading materials touching not only politics and religion, but almost everything else as well.

3. *With the development of modern mass communication there is increasing difficulty in distinguishing propaganda material from non-propaganda material.* When the reader of the early paper read the vituperative political discussions he was aware that he was in a propagandist field, and that deliberate attempt was being made to sway his feelings and shift his attitudes. In American newspapers the editorial matter was not originally segregated, but was included in the news itself; this fact was understood by the subscriber. Although the reader of today's editorials is aware that they are opinion, and designed to influence his thought and attitudes, he does not have assurance that the material of the news columns is not likewise included for a purpose. The conscious selection by editors of “stacked news,” as well as their unwitting publication of copy prepared in the interest of special groups, complicates, even for those readers who would distinguish, the discrimination between propaganda and other material. The same difficulty is associated with the other mass communication media. The most innocent material, on the surface, may actually be quite other than it seems.

4. *It is constantly more difficult for the individual to escape contact with the stimuli that are disseminated by the agencies of mass communication.* It is a firmly established principle of modern publicity that the eye or the ear of the individual must be caught on every possible occasion. In straight advertising, for example, the morning newspaper will carry the copy; it will appear again in the street car (or even in the flip device in the taxicab); at the office a letter or a telegram may supplement what already has been said; the menu and the matches of the restaurant will serve as another medium of transmission; the afternoon paper repeats what the

morning issue has already said; billboards are employed to catch a wandering eye; the radio program has its sponsor; the motion picture has not been free of advertising influence; and more recently the neon sign takes the "message" far into the night. The use of the telephone for advertising purposes has become a major annoyance, against which there is no defense.

No advertiser may use all these media at any one time, but some advertisement confronts the individual wherever he goes. If he can be caught "off guard," so much the better. It was inevitable that the existence of the communication network should give rise to the development of a business designed to utilize it for special ends. The public relations counsel, for example, is a natural outgrowth of modern communication in a complex social organization. But he is no exception, for every one—advertiser, reformer, educator—seeks to employ the facilities of mass communication in the furtherance of his objectives. It is the "enveloping omnipresence" of mass communication that distinguishes our century from earlier periods in the history of communication in general and propaganda in particular.

5. *Modern mass communication is characterized by a pyramiding of the "acceptance factors."* The three dominant agencies in the mass communication network are operated (with a few exceptions) as commercial enterprises. "Audience appeal" is fundamental to each of them. Newspapers seek wider circulations; radio broadcasting stations seek greater "coverage"; the motion picture is entertainment frankly calculated to draw maximum audiences. With all three there is skillful presentation of material in such a manner that readiness to accept is enhanced, and interest is caught and maintained. The entertainment values are carefully calculated, and prestige factors are introduced, often with great subtlety.

For example, a given radio broadcast will employ an announcer of pleasant and soothing voice. He introduces music of a high order of excellence. Between selections a "doctor" or a "scientist" will talk briefly on some recent discoveries (usually involving the product of the sponsor), and on the same program a distinguished citizen will appear. Thus the effects of music, of an appeal through the prestige of science, and of the prestige of a well-known personality all blend. Each by itself has potency; by pyramiding in a single program and in subsequent programs, this potency is increased.

What is true of radio is likewise true of the newspaper material and the motion picture. Furthermore, the pyramiding of the acceptance factors applies not only within a given agency, but, as has been stressed earlier, each agency supplements the others. This, together with the pervasiveness stressed in the preceding paragraph, makes modern propaganda in all its aspects a phenomenon so different from that of a generation ago that the analysis in the two periods must proceed along basically different lines.

SOCIAL PROBLEMS

What are some of the problems that modern mass communication has either engendered or intensified? Three are selected for special mention:

1. *The adjustment of the older and more institutionalized agencies of education to the new conditions enumerated above.* Elementary factual knowledge necessary for living in our culture, and the basic social values, have always been acquired by the growing child from many sources. The family, the play group, the church, and various other primary groups have molded the individual. Main responsibility for the process of education, however, has tended to shift to the school. The school procedures and the techniques employed in the formal educational process developed before the appearance of mass communication as we know it in 1935. The social environment to which the individual adapted himself prior to the evolution of the modern mass communication network was a different environment from that which now exists. A new world has been created—a world saturated with the influences that emanate from the new integrated communication system.

How successfully is the school adjusting itself to these new conditions? How successfully is it "competing" with the mass communication agencies in inculcating values and attitudes? How well is it training its graduates to protect themselves against the insistent bombardment of stimuli from the new interlaced lines of communication? "Smoking is bad, especially for athletes," says the school. "Get a lift from a cigarette," says the advertisement (with prestige indorsements by prominent athletes). Which is more effective—the lesson in civics or the appeal of the radio agitator? the lesson in history, or the motion picture of Japanese villains and of air maneuvers? That there is a contradiction between materials of the classroom and those spread through mass communication channels can scarcely be denied. Which set of influences is stronger; which more profoundly motivates conduct? The answers may not yet be known, but the significance of the questions should be clear.

2. *The protection of the adult from the uncertainty and tensions engendered by competing suggestions.* That mass communication involves competition of stimuli cannot be questioned. What shall one believe from the news columns? Which, if any, of the advertisements shall be accepted as truthful? Which of the conflicting doctrines spread by the radio orator shall be acted upon? How shall the moral teachings of the church and of the motion pictures be reconciled? Is there truth in what the demagogue says? Which demagogue? The more simple a society, the more readily the individual chooses among conflicting points of view and competing suggestions. The complexity of the world and the difficulty of escape from mass communication influences make exceedingly difficult the matter of choice and the development of an "adult discount."

3. *The influence of modern communication upon the folkways and mores.* The folkways and mores are the framework within which social life

is lived. They are the guides to conduct. Figuratively speaking, they are the ballast in social behavior. For each individual there must be a group ideology in terms of which life acquires its meaning; this may be consciously formulated or but vaguely felt.⁵ It may be stated as a hypothesis that disruption of this ideological pattern, either in any individual or for the group as a whole, gives rise to tensions and stresses characterized by feelings of dissatisfaction, disquietude, loss of focus, and demoralization. To what extent has some of the confusion of recent years been engendered by the impact of the content of modern mass communication upon the existing folkways?

The point may be stated specifically with an illustration. A recent motion picture, with two of the most glamorous stars, tells the story of an industrial family to whom hard work and devotion to business are dominating values. A daughter in this family is married to a handsome young man who is resisting the pressures to fit him into the family enterprises. He revolts, is spurred on by a young and handsome sister-in-law, and leaves his wife to become a race-track follower, plunging all resources on a horse to whom he pins his faith. He is later joined by the unmarried sister-in-law, who remains with him in a relationship that the producers have not clarified. Funds have given out, and it is necessary to live by wits and deception. Our hero is bent on getting something for nothing, and is generally successful in doing so. His devotion is exclusively for his horse. Eventually the great race. Success. Then divorce from the wife to marry her sister. Back to father, who by this time sees the dreariness and drabness of his own life. The final scene: father deserting his business to run off with the young couple, presumably to spend his declining years playing the ponies.

No summary can possibly indicate the deviation from accepted values that this film reveals and makes acceptable. No summary can suggest the glamor and excitement evoked by the picture. As entertainment, it is of a high order—but what is its effect? It is not intended here to evaluate the picture on any ethical grounds, but it is suggested that a romantic and alluring presentation of emotionally charged values that run counter to the existing mores must have its social consequences. The film may not be typical of all mass communication, but a conflict of values seems inevitable, given our existing mass communication and its control by commercial groups bent on entertaining and attracting large audiences.

If the older folkways and values are disrupted by mass communication, what takes their place? This question is put with no moral intent nor to suggest any reform. It is only pointed out that as a result of new inventions and their integrated utilization new problems in human adjustment are being created, and that these problems are a part of the chaotic state of mind which many students believe to be one of the characteristics of contemporary society.

⁵ The reader is especially referred to *Modern Education*, by Otto Rank. New York: Knopf, 1932.

POTENTIALITIES OF COMMUNICATIONS SYSTEM

It is banal to suggest the need for research and study, but it is likewise obvious that the rapidity of growth of the communication network has been accompanied by the development of new problems whose significance is not yet fully appreciated. The growth of modern communication has been haphazard and without plan. There has been little exercise of control. The dominant drive has been the adaptation of the new agencies to business ends. Always, however, the focus of the vast communication system is the individual. It is upon him that its multitudinous stimuli eventually impinge.

A communication system fraught with greater possibilities for evil or for good has never before existed on so vast a scale. It is at once terrifying and inspiring; terrifying, because of the possibilities it opens for the accomplishment of selfish ends; inspiring for its potentialities of social self-control.⁶

59. HOW TO DETECT PROPAGANDA

Citizens desiring to act intelligently in performing their responsibilities find it worth while to recognize propaganda. The reading below was circulated in bulletin form¹ by the Institute for Propaganda Analysis, Inc. (not active now). The material for this bulletin was first organized by Clyde R. Miller, Associate Professor of Education, and given as a lecture in his course in public opinion and education at Teachers College, Columbia University. Subsequently it was made available to the Institute for Propaganda Analysis. Professor Miller is secretary to the board of the Institute.

We are fooled by propaganda chiefly because we don't recognize it when we see it. It may be fun to be fooled but, as the cigarette ads used to say, it is more fun to know. We can more easily recognize propaganda when we see it if we are familiar with the seven common propaganda devices. These are:

1. The Name Calling Device
2. The Glittering Generalities Device
3. The Transfer Device
4. The Testimonial Device
5. The Plain Folks Device
6. The Card Stacking Device
7. The Band Wagon Device

Why are we fooled by these devices? Because they appeal to our emotions rather than to our reason. They make us believe and do something we would not believe or do if we thought about it calmly, dispassionately.

⁶ Willey and Rice, *op. cit.*, p. 209.

¹ Bulletin of the Institute for Propaganda Analysis, Inc., Vol. I, No. 2 (November 1937). Used by permission of Professor Clyde R. Miller.

In examining these devices, note that they work most effectively at those times when we are too lazy to think for ourselves; also, they tie into emotions which sway us to be "for" or "against" nations, races, religions, ideals, economic and political policies and practices, and so on through automobiles, cigarettes, radios, toothpastes, presidents, and wars. With our emotions stirred, it may be fun to be fooled by these propaganda devices, but it is more fun and infinitely more to our own interests to know how they work.

Lincoln must have had in mind citizens who could balance their emotions with intelligence when he made his remark: ". . . but you can't fool all of the people all of the time."

Name Calling

"Name Calling" is a device to make us form a judgment without examining the evidence on which it should be based. Here the propagandist appeals to our hate and fear. He does this by giving "bad names" to those individuals, groups, nations, races, policies, practices, beliefs, and ideals which he would have us condemn and reject. For centuries the name "heretic" was bad. Thousands were oppressed, tortured, or put to death as heretics. Anybody who dissented from popular or group belief or practice was in danger of being called a heretic. In the light of today's knowledge, some heresies were bad and some were good. Many of the pioneers of modern science were called heretics; witness the cases of Copernicus, Galileo, Bruno. See *A History of the Warfare of Science with Theology*, Andrew Dickson White, D. Appleton & Co.) Today's bad names include: Fascist, demagogue, dictator, Red, financial oligarchy, Communist, muck-raker, alien, outside agitator, economic royalist, Utopian, rabble-rouser, trouble-maker, Tory, Constitution wrecker.

"Al" Smith called Roosevelt a Communist by implication when he said in his Liberty League speech, "There can be only one capital, Washington or Moscow." When "Al" Smith was running for the presidency many called him a tool of the Pope, saying in effect, "We must choose between Washington and Rome." That implied that Mr. Smith, if elected President, would take his orders from the Pope. Recently, Mr. Justice Hugo Black has been associated with a bad name, Ku Klux Klan. In these cases some propagandists have tried to make us form judgments without examining essential evidence and implications. "Al Smith is a Catholic. He must never be President." "Roosevelt is a Red. Defeat his program." "Hugo Black is or was a Klansman. Take him out of the Supreme Court."

Use of "bad names" without presentation of their essential meaning, without all their pertinent implications, comprises perhaps the most common of all propaganda devices. Those who want to *maintain* the status quo apply bad names to those who would change it. For example, the Hearst press applies bad names to Communists and Socialists. Those who

want to *change* the status quo apply bad names to those who would maintain it. For example, the Daily Worker and the American Guardian apply bad names to conservative Republicans and Democrats.

Glittering Generalities

"Glittering Generalities" is a device by which the propagandist identifies his program with virtue by use of "virtue words." Here he appeals to our emotions of love, generosity, and brotherhood. He uses words like truth, freedom, honor, liberty, social justice, public service, the right to work, loyalty, progress, democracy, the American way, Constitution defender. These words suggest shining ideals. All persons of good will believe in these ideals. Hence the propagandist, by identifying his individual group, nation, race, policy, practice, or belief with such ideals, seeks to win us to his cause. As Name Calling is a device to make us form a judgment to *reject and condemn*, without examining the evidence, Glittering Generalities is a device to make us *accept and approve*, without examining the evidence.

For example, use of the phrases, "the right to work" and "social justice" may be a device to make us accept programs for meeting the labor-capital problem which, if we examined them critically, we would not accept at all.

In the Name Calling and Glittering Generalities devices, words are used to stir up our emotions and to befog our thinking. In one device "bad words" are used to make us mad; in the other "good words" are used to make us glad. (See "The Tyranny of Words," by Stuart Chase, in *Harpers Magazine* for November, 1937.)

The propagandist is most effective in use of these devices when his words make us create devils to fight or gods to adore. By his use of the "bad words," we personify as a "devil" some nation, race, group, individual, policy, practice, or ideal; we are made fighting mad to destroy it. By use of "good words," we personify as a god-like idol some nation, race, group, etc. Words which are "bad" to some are "good" to others, or may be made so. Thus, to some the New Deal is "a prophecy of social salvation" while to others it is "an omen of social disaster."

From consideration of names, "bad" and "good," we pass to institutions and symbols, also "bad" and "good." We see these in the next device.

Transfer

"Transfer" is a device by which the propagandist carries over the authority, sanction, and prestige of something we respect and revere to something he would have us accept. For example, most of us respect and revere our church and our nation. If the propagandist succeeds in getting church or nation to approve a campaign in behalf of some program, he thereby transfers its authority, sanction, and prestige to that program. Thus we may accept something which otherwise we might reject.

In the Transfer device symbols are constantly used. The cross represents the Christian Church. The flag represents the nation. Cartoons like Uncle Sam represent a consensus of public opinion. Those symbols stir emotions. At their very sight, with the speed of light, is aroused the whole complex of feelings we have with respect to church or nation. A cartoonist by having Uncle Sam disapprove a budget for unemployment relief would have us feel that the whole United States disapproves relief costs. By drawing an Uncle Sam who approves the same budget, the cartoonist would have us feel that the American people approve it. Thus, the Transfer device is used both for and against causes and ideas.

Testimonial

The "Testimonial" is a device to make us accept anything from a patent medicine or a cigarette to a program of national policy. In this device the propagandist makes use of testimonials. "When I feel tired, I smoke a Camel and get the grandest 'lift.' " "We believe the John Lewis plan of labor organization is splendid; C. I. O. should be supported." This device works in reverse also; counter-testimonials may be employed. Seldom are these used against commercial products like patent medicines and cigarettes, but they are constantly employed in social, economic, and political issues. "We believe that the John Lewis plan of labor organization is bad; C. I. O. should not be supported."

Plain Folks

"Plain Folks" is a device used by politicians, labor leaders, business men, and even by ministers and educators to win our confidence by appearing to be people like ourselves—"just plain folks among the neighbors." In election years especially do candidates show their devotion to little children and the common, homey things of life. They have front porch campaigns. For the newspaper men they raid the kitchen cupboard, finding there some of the good wife's apple pie. They go to country picnics; they attend service at the old frame church; they pitch hay and go fishing; they show their belief in home and mother. In short, they would win our votes by showing that they're just as common as the rest of us—"Just plain folks,"—and, therefore, wise and good. Business men often are "plain folks" with the factory hands. Even distillers use the device. "It's our family's whiskey, neighbor; and neighbor, it's your price."

Card Stacking

"Card Stacking" is a device in which the propagandist employs all the arts of deception to win our support for himself, his group, nation, race, policy, practice, belief or ideal. He stacks the cards against the truth. He uses under-emphasis and over-emphasis to dodge issues and evade facts.

He resorts to lies, censorship, and distortion. He omits facts. He offers false testimony. He creates a smoke-screen of clamor by raising a new issue when he wants an embarrassing matter forgotten. He draws a red herring across the trail to confuse and divert those in quest of facts he does not want revealed. He makes the unreal appear real and the real appear unreal. He lets half-truth masquerade as truth. By the Card Stacking device, a mediocre candidate, through the "build-up," is made to appear an intellectual titan; an ordinary prize fighter a probable world champion; a worthless patent medicine a beneficent cure. By means of this device propagandists would convince us that a ruthless war of aggression is a crusade for righteousness. Some member nations of the Non-Intervention Committee send their troops to intervene in Spain. Card Stacking employs sham, hypocrisy, effrontery.

The Band Wagon

The "Band Wagon" is a device to make us follow the crowd, to accept the propagandist's program en masse. Here his theme is: "Everybody's doing it." His techniques range from those of medicine show to dramatic spectacle. He hires a hall, fills a great stadium, marches a million men in parade. He employs symbols, colors, music, movement, all the dramatic arts. He appeals to the desire, common to most of us, to "follow the crowd." Because he wants us to "follow the crowd" in masses, he directs his appeal to groups held together by common ties of nationality, religion, race, environment, sex, vocation. Thus propagandists campaigning for or against a program will appeal to us as Catholics, Protestants, or Jews; as members of the Nordic race or as Negroes; as farmers or as school teachers; as housewives or as miners. All the artifices of flattery are used to harness the fears and hatreds, prejudices, and biases, convictions and ideals common to the group; thus emotion is made to push and pull the group on to the Band Wagon. In newspaper articles and in the spoken word this device is also found. "Don't throw your vote away. Vote for our candidate. He's sure to win." Nearly every candidate wins in every election—before the votes are in.

Propaganda and Emotion

Observe that in all these devices our emotion is the stuff with which propagandists work. Without it they are helpless; with it, harnessing it to their purposes, they can make us glow with pride or burn with hatred, they can make us zealots in behalf of the program they espouse. As we said in our first letter, propaganda as generally understood is expression of opinion or action by individuals or groups with reference to pre-determined ends. Without the appeal to our emotion—to our fears and to our courage, to our selfishness and unselfishness, to our loves and to our hates—propagandists would influence few opinions and few actions.

To say this is not to condemn emotion, an essential part of life, or to assert that all predetermined ends of propagandists are "bad." What we mean is that the intelligent citizen does not want propagandists to utilize his emotions, even to the attainment of "good" ends, without knowing what is going on. He does not want to be "used" in the attainment of ends he may later consider "bad." He does not want to be gullible. He does not want to be fooled. He does not want to be duped, even in a "good" cause. He wants to know the facts and among these is included the fact of the utilization of his emotions.

For better understanding of the relationship between propaganda and emotion see Ch. 1 of *Folkways* by William Graham Sumner (Ginn and Company). This shows why most of us tend to feel, believe, and act in traditional patterns. See also *Mind in the Making* by James Harvey Robinson (Harper Bros.). This reveals the nature of the mind and suggests how to analyze propaganda appealing to traditional thought patterns.

Keeping in mind the seven common propaganda devices, turn to today's newspapers and almost immediately you can spot examples of them all. At election time or during any campaign, Plain Folks and Band Wagon are common. Card Stacking is hardest to detect because it is adroitly executed or because we lack the information necessary to nail the lie. A little practice with the daily newspapers in detecting these propaganda devices soon enables us to detect them elsewhere—in radio, news-reel, books, magazines, and in expression of labor unions, business groups, churches, schools, political parties.

60. HOW TO ANALYZE NEWSPAPERS

Newspapers are great aids to citizens who want to vote intelligently. However, one will want to read his daily paper with discrimination and objectivity. The following article from a bulletin¹ of the Institute for Propaganda Analysis may help in the development of such discrimination and objectivity.

From time to time these letters will deal with channels of communication. This letter suggests some points for us to keep in mind in analyzing newspapers. For those who would understand how propaganda operates with reference to today's issues, the newspaper has special significance. Every day it brings us in printed form examples of propaganda which we can read, clip, and study at our convenience.

One should remember that propaganda is always associated with conflict—as cause, as effect, or as cause and effect. In this respect propaganda has something in common with news. So close is the association that it may properly be said that news is usually the story of some conflict. The age-long battle of men against the impersonal forces of nature—fire, flood,

¹ Bulletin of the Institute for Propaganda Analysis, Inc., Vol. I, No. 4 (January 1938). Used by permission of Professor Clyde R. Miller, Secretary of the Board of the Institute.

drought, heat, and cold—gives us recurrently many exciting conflicts which become news. The struggle of men to learn the secrets of natural forces and to harness them to the purposes of men is itself a conflict, waged through the centuries. Out of this conflict—mankind's battle for increased knowledge—have come the stories, the news of scientific achievements in many related fields.

Observed much more frequently in the news, however, are the conflicts of men with men and groups of men with other groups of men. A robber attacks an honest citizen. The police capture the robber. The prisoner is tried—conflict between prosecution and defense. Or a group of men, a labor union, disputes with an employer or a group of employers over wages and working conditions. These and other groups bring conflicting pressures on governmental bodies to make laws or to use police power to help accomplish some desired ends. If there are sharp differences of opinion about the ends sought or about methods used to attain these ends, there are additional conflicts which may illustrate many or all of the common propagandas we find associated with stresses and pressures involving government, business, and labor.

Two Main Purposes

Every American newspaper, unless its expenses are paid by some individual or group for the attainment of some special end, must have two main purposes. *First, it must show a profit.* In this it is like the corner drug store. *Second, in order to make money, it must print news which attracts and holds readers.* In most cases a newspaper's main source of income is advertising. Ordinarily, it can obtain advertising at profitable rates only when it has enough readers to make the advertising profitable to the enterprises which pay for it.

What kinds of news and conflicts attract readers? That depends on the readers. The more intelligent readers of wide interests are attracted and held by the kinds of basic conflicts featured in the news of such papers as *The New York Times*, *The New York Herald Tribune*, *The Baltimore Sun*, *The Christian Science Monitor*, *The Springfield Republican*, *The St. Louis Post-Dispatch*, *The St. Louis Star Times*, *The Des Moines Register*, *The Kansas City Star*. (America has some of the best newspapers in the world; the above named papers are widely rated among the best.) A number of the conflicts featured by these newspapers, like propagandas which concern us most, have some significant bearing on matters of large social consequence: our incomes, our working conditions, our health, our education, our civil freedoms, and our responsibilities.

Even the best available newspapers print much news not because it has any significant bearing on our everyday problems, but simply because it is entertaining. Under the head of entertainment come the comic strips, the society columns, and much of the news involving crime, vice, and sex. Most of this entertainment news has little bearing on matters of large social significance although some of it does unquestionably affect popular

standards of behavior and thought, which are areas important to analysts of propaganda. A sensational murder or sex crime might be emphasized in a manner to divert attention deliberately from the basic sources of such crimes or from deeper, more general, social disorders.

Freedom of the Press

Especially important are the propagandas and news items growing out of the conflicts which affect our everyday problems.

Under a democratic government the decisions which we make as business men, labor unionists, teachers, or clergymen, or the decisions we make as voters, are for the most part decisions affecting our various democratic freedoms and responsibilities. Unless we possess the essential facts and implications of the issues which we must decide, our decisions are perforce based upon misinformation, lack of information, guess-work, or emotion, and hence may be contrary to our own interests. Most of us must rely on the newspapers for virtually all information bearing on these issues or conflicts.

Do local, state, or federal governmental officials create legislative or executive censorship, direct or indirect, to prevent the press from printing essential facts and implications? Does the apathy or lack of interest of readers in these matters make it unprofitable for newspapers to emphasize this more important news? Finally, do publishers, editors, or reporters themselves "take sides" on these issues, and in consequence cause the news to be so written or so edited as to omit or distort some essential facts and implications? In brief, are newspapers themselves sometimes so operated as to limit the freedom of newspaper readers to obtain essential facts and implications of conflicts affecting their welfare? Insofar as a newspaper is thus conducted it becomes itself a medium for specific propagandas and opinions.

In a recently published study of the Washington press corps made under the auspices of the Social Science Research Council (*The Washington Correspondents*, Harcourt, Brace and Company, 1937, 436 pp. \$3.00) Leo C. Rosten discovered through the circulation of several anonymous questionnaires that 60.5 per cent of this top-ranking, relatively high-salaried group of 127 men believe that the press devotes too much space to scandals and sensations while 29.8 per cent believe the contrary and 9.6 per cent are uncertain; that 48.5 per cent believe the news columns are not equally fair to capital and to labor while 43.8 per cent believe that they are equally fair and 7.6 per cent are uncertain; that 86.6 per cent believe, however, that newspapers do not give significant accounts of basic economic conflicts while only 11.4 per cent believe they do and only 1.9 per cent are uncertain; that 63.8 per cent believe the publishers' cry of "Freedom of the Press" in fighting against the NRA code was a ruse while 24.7 per cent accept the cry at face value and 11.4 per cent are uncertain; that 46.2 per cent believe "most papers printed unfair or distorted stories about the Tugwell Pure Foods Bill" while only 21.6 per cent

held that the news accounts were fair and the large bloc of 32 per cent was uncertain; that 60 per cent agreed that "It is almost impossible to be objective. You read your paper, notice its editorials, get praised for some stories and criticized for others. You 'sense policy' and are psychologically driven to slant your stories accordingly," while only 34.2 per cent disagreed with this and only 5.6 per cent were uncertain; that 55.5 per cent testified they had seen their writings "played down, cut or killed for 'policy' reasons," while 41.6 per cent held to the contrary and 2.7 per cent were uncertain; that 60.8 per cent held that the correspondents in Washington try to please their editors and 28.3 per cent disagreed; and that 60.6 per cent testified they wrote stories to fit the editorial preconceptions of their employer and only 34.8 per cent testified to the contrary.

A number of individual correspondents told Mr. Rosten (who was guided in his searching inquiry by Professor Charles E. Merriam, chairman of the political science department of the University of Chicago, Professor Harold D. Lasswell of the University of Chicago, Professor Leonard D. White, and Dr. Charles Ascher) that publishers had brought pressure to bear upon them in various ways to produce a certain news "slant." Mr. Rosten says, "Newspapermen become expert in estimating the pleasure with which their home offices will welcome stories with a particular political emphasis or with particular political implications."

It would be strange indeed if publishers, editors, and reporters, as individuals or as groups and associations, were not affected by emotions, prejudices, and biases irrespective of whether called by these names or designated as convictions, principles, or ideals. Like the rest of us they are profoundly influenced by their own inheritance and environment. They may "take sides" because they are led to do so by their own convictions or biases, or because of pressure applied by readers and advertisers. In this respect they are more or less like business men, teachers, clergymen, and people in general. We believe, however, that they are less like them; that their very trade or vocation, involving as it does daily concern with the scores of conflicts out of which news flows, makes them tend to become less prejudiced, less biased, more skeptical, and more objective with respect to current conflicts than are most citizens.

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61. REGISTRATION OF ORGANIZED PRESSURE GROUPS

This reading is taken from Senate Report No. 1011, *Organization of Congress* (79th Congress, 2d Session, March 4, 1946). For other portions of this report see reading no. 53, *supra*, and nos. 66 and 87, *infra*.

VI. REGISTRATION OF ORGANIZED GROUPS

Your committee heard many complaints during its hearings of the attempts of organized pressure groups to influence the decisions of Congress on legislation pending before the two Houses or their committees.

We fully recognize the right of any citizen to petition the Government for the redress of grievances or freely to express opinions to individual Members or to committees on legislation and on current political issues. However, mass means of communication and the art of public relations have so increased the pressures upon Congress as to distort and confuse the normal expressions of public opinion.

A pure and representative expression of public sentiment is welcome and helpful in considering legislation, but professionally inspired efforts to put pressure upon Congress cannot be conducive to well considered legislation.

The problem of safeguarding this free expression of the will of the people from distortion is a difficult one. Rather than stifle any such expression, your committee hesitates to make any recommendation upon the control of lobbyists or pressure groups.

We feel, however, that it will be possible to improve the situation without impairing in any way this freedom of expression. The availability of information regarding organized groups and full knowledge of their expenditures for influencing legislation, their membership and the source of contributions to them of large amounts of money, would prove helpful to Congress in evaluating their representations without impairing the rights of any individual or group freely to express its opinions to the Congress.

1. Registration of Representatives of Organized Groups

Recommendation: That Congress enact legislation providing for the registration of organized groups and their agents who seek to influence legislation and that such registration include quarterly statements of expenditures made for this purpose.

In order to enable Congress better to evaluate and determine evidence, data, or communications from organized groups seeking to influence legislative action, we recommend the adoption of legislation requiring the registration of all groups engaged and individuals employed in such activity.

Groups and employed individuals should be required to register each session with the Clerk of the House of Representatives and the Secretary of the Senate and to submit under oath such pertinent data as will clearly indicate to the Congress the nature and extent of their activities. Registration of individuals should be provided for on uniform blanks in both Houses, stating by whom the agent is employed, the period of such employment, his special subject of legislative interest, and his compensation. Every 3 months such individuals would be required to report and itemize under oath any expenses incurred by themselves and by the organizations they represent in promoting or opposing legislation, the purpose of the expenditures, and a list of the bills and resolutions promoted or opposed. All information on registration and expenditures for influencing legislation

should be compiled by the clerks of the House and Senate and be printed each quarter in the Congressional Record.

Registration of organizations should include a statement of their bona fide total membership and the amounts expended each quarter for the influencing of legislation. Any contributor of money in excess of \$500 per year would be required to be listed in the registration.

XI

CONGRESS: ORGANIZATION, PROCEDURE, SOURCE AND LIMITS OF POWERS



- 62. ORGANIZATION OF THE HOUSE OF REPRESENTATIVES
- 63. TAKING A BILL THROUGH CONGRESS: PASSAGE OVER VETO OF PRESIDENT
- 64. A CONFERENCE COMMITTEE
- 65. A PRIVATE BILL
- 66. *REORGANIZATION OF CONGRESS*
Senate Report No. 1011
- 67. LIMITATION OF DEBATE IN THE SENATE
(A) Hardwick; (B) Dawes
- 68. POWERS BASED ON CONSTITUTION
M'Culloch v. Maryland
- 69. UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER
Schechter v. United States

AFTER the student has become familiar in some degree with (a) the background of government in the United States, (b) the growth of the Constitution, and (c) inter-relationships of individuals, states, and central government, it is helpful to focus attention in turn upon each of the three great branches of the central government,—legislative, executive, and judicial. In this chapter are included readings dealing with Congress, the legislative branch,—its organization, its procedure, and a general approach to the source and limits of its powers. Readings in other chapters of this volume, particularly 15–20 *infra*, will throw additional light upon the powers of Congress.

CONGRESS: ORGANIZATION, PROCEDURE, SOURCE AND LIMITS OF POWERS



62. ORGANIZATION OF THE HOUSE OF REPRESENTATIVES

The several steps in the organization of the House of Representatives of the Seventy-ninth Congress of the United States are seen in the following excerpts from the *Congressional Record*, Volume 91, Part 1 (January 3, 1945).

HOUSE OF REPRESENTATIVES

Wednesday, January 3, 1945

This being the day fixed by the twentieth amendment of the Constitution for the annual meeting of the Congress of the United States, the Members of the House of Representatives of the Seventy-ninth Congress met in their Hall, and at 12 o'clock noon were called to order by the Clerk of the House of Representatives, Hon. South Trimble.

PRAYER

The Chaplain of the Seventy-eighth Congress, Rev. James Shera Montgomery, D. D., offered the following prayer:

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CALL OF THE ROLL BY STATES

The CLERK. Representatives-elect, this is the day fixed by the Constitution for the meeting of the Seventy-ninth Congress, and, as the law directs, the Clerk of the House has prepared the official roll call of the Representatives-elect. Certificates of election covering the 435 seats in the Seventy-ninth Congress have been received by the Clerk of the House of Representatives of the Seventy-eighth Congress, and the names of those persons whose credentials show that they were regularly elected as Representatives in accordance with the law of their respective States or the

United States will be called. As the roll is called, following the alphabetical order of States, beginning with the State of Alabama, the Representatives-elect will please answer to their names to determine whether there is a quorum present.

The Clerk will call the roll.

The Clerk called the roll by States, and the following Representatives-elect answered to their names:

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The CLERK. The roll call discloses the presence of 397 Members. A quorum is present.

The CLERK states that credentials, regular in form, have been filed showing the election of E. L. BARTLETT, as Delegate from the Territory of Alaska, and of JOSEPH R. FARRINGTON, as Delegate from the Territory of Hawaii. A Resident Commissioner to the United States from the Commonwealth of the Philippines was elected, CARLOS P. ROMULO. The Clerk has also received certificate of election signed by the Governor of Puerto Rico showing the election of JESUS T. PINERO, as Resident Commissioner here for a term of 4 years, beginning January 3, 1945.

The Clerk is happy to state that since the regular election of Representatives to the Seventy-ninth Congress no deaths or resignations have occurred changing the representation of any State.

ELECTION OF SPEAKER

The CLERK. The next business in order is the election of a Speaker of the House, and nominations are now in order.

Mr. COOPER. Mr. Clerk, as chairman of the Democratic caucus, I am directed by the unanimous vote of that caucus to present for election to the office of the Speaker of the House of Representatives of the Seventy-ninth Congress the name of Hon. SAM RAYBURN, a Representative-elect from the State of Texas.

Mr. WOODRUFF of Michigan. Mr. Clerk, by authority, and by direction, and by unanimous vote of the Republican conference, representing a minority in this House, I nominate for Speaker of the House of Representatives the Honorable JOSEPH W. MARTIN, Jr., a Representative-elect from the State of Massachusetts to the Seventy-ninth Congress.

The CLERK. Hon. SAM RAYBURN, a Representative-elect from the State of Texas, and Hon. JOSEPH W. MARTIN, Jr., a Representative-elect from the State of Massachusetts, have been placed in nomination. Are there any further nominations?

There being no further nominations, the Clerk appoints the gentleman from Florida [Mr. PETERSON], the gentleman from Nevada [Mr. BUNKER], the gentleman from Iowa [Mr. TALLE], and the gentleman from New York [Mr. COLE] to act as tellers.

The roll will now be called and those responding will indicate by

surname the nominee of their choice. The tellers will please take places at the desk in front of the Speaker's rostrum.

The tellers having taken their places, the House proceeded to vote for Speaker. The following is the vote in detail:

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The CLERK. The tellers agree in their tally. The total number of votes cast is 394, of which Hon. SAM RAYBURN received 224, and Hon. JOSEPH MARTIN, Jr., 168; and present, 2.

Therefore, Hon. SAM RAYBURN, a Representative-elect from the State of Texas, having received a majority of all the votes cast, is duly elected Speaker of the House of Representatives for the Seventy-ninth Congress.

The gentleman from Massachusetts [Mr. MARTIN], the gentleman from Massachusetts [Mr. McCORMACK], the gentleman from Tennessee [Mr. COOPER], the gentleman from Michigan [Mr. WOODRUFF], and the gentleman from Missouri [Mr. CANNON] will please conduct the Speaker-elect to the chair.

Mr. MARTIN of Massachusetts.

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. . . Ladies and gentlemen, I present to you your Speaker and my Speaker, Hon. SAM RAYBURN, of Texas.

Mr. RAYBURN. Mr. Martin, I am deeply grateful to you for your gracious words in presenting me to my colleagues of the House of Representatives. To all of my colleagues in the House who have been honored by membership in the Seventy-ninth Congress, I say to you, after the action of today, from my heart I thank you. For the fourth time you have done me this great honor.

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Mr. SABATH then administered the oath of office to Mr. RAYBURN.

SWEARING IN OF THE MEMBERS

The SPEAKER. If the Members will rise in their place, the Chair will administer the oath of office to all.

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The SPEAKER. If the Member is present he may take the oath.

The Members and Delegates-elect rose, and the Speaker administered to them the oath of office.

ELECTION OF OFFICERS

Mr. COOPER. Mr. Speaker, I offer a resolution (H. Res. 1) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That South Trimble, of the State of Kentucky, be, and he is hereby, chosen Clerk of the House of Representatives;

That Kenneth Romney, of the State of Montana, be, and he is hereby, chosen Sergeant at Arms of the House of Representatives;

That Ralph R. Roberts, of the State of Indiana, be, and he is hereby, chosen Doorkeeper of the House of Representatives;

That Finis E. Scott, of the State of Tennessee, be, and he is hereby, chosen Postmaster of the House of Representatives; and

That Rev. James Shera Montgomery, D. D., of the District of Columbia, be, and is hereby, chosen Chaplain of the House of Representatives.

Mr. WOODRUFF of Michigan. Mr. Speaker, I ask that the resolution be divided and that a vote first be taken on the election of Chaplain, after which I shall offer a substitute resolution.

The SPEAKER. The question is on the election of the Chaplain of the House.

The question was taken; and the Reverend James Shera Montgomery, D. D., was unanimously elected Chaplain of the House of Representatives for the Seventy-ninth Congress.

Mr. WOODRUFF of Michigan. Mr. Speaker, I offer a substitute resolution for the resolution offered by the gentleman from Tennessee [Mr. COOPER].

The Clerk read the substitute resolution, as follows:

Substitute resolution offered by Mr. WOODRUFF of Michigan:

"Resolved, That John Andrews, of the State of Massachusetts, be, and he is hereby, chosen Clerk of the House of Representatives;

"That W. F. Russell, of the State of Pennsylvania, be, and he is hereby, chosen Sergeant at Arms of the House of Representatives;

"That James P. Griffin, of the State of New Jersey, be, and he is hereby, chosen Doorkeeper of the House of Representatives;

"That Frank W. Collier, of the State of Wisconsin, be, and he is hereby, elected Postmaster of the House of Representatives."

The SPEAKER. The question is on the substitute resolution.

The substitute resolution was rejected.

The SPEAKER. The question recurs on the original resolution offered by the gentleman from Tennessee [Mr. COOPER].

The resolution was agreed to.

A motion to reconsider was laid on the table.

SWEARING IN OF OFFICERS OF THE HOUSE

Mr. South Trimble, Mr. Kenneth Romney, Mr. Ralph R. Roberts, Mr. Finis E. Scott, and Rev. James Shera Montgomery, D. D., appeared at the bar of the House, and the oath of office was administered to them by the Speaker.

NOTIFICATION OF SENATE OF ORGANIZATION
OF THE HOUSE

Mr. DOUGHTON of North Carolina. Mr. Speaker, I offer a resolution (H. Res. 2) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That a message be sent to the Senate to inform that body that a quorum of the House of Representatives has assembled; that SAM RAYBURN, a Representative from the State of Texas, has been elected Speaker, and South Trimble, a citizen of the State of Kentucky, has been elected Clerk; and that the House is ready for business.

The resolution was agreed to.

COMMITTEE TO NOTIFY THE PRESIDENT OF
THE UNITED STATES

Mr. McCORMACK. Mr. Speaker, I offer a resolution (H. Res. 3) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That a committee of three Members be appointed by the Speaker on the part of the House of Representatives to join with a committee on the part of the Senate to notify the President of the United States that a quorum of each House is assembled and that Congress is ready to receive any communication that he may be pleased to make.

The resolution was agreed to.

The SPEAKER. The Chair appoints as members of the committee on the part of the House to join with the committee on the part of the Senate to notify the President of the United States that a quorum of each House has been assembled and that the Congress is ready to receive any communication he may be pleased to make, the gentleman from Massachusetts [Mr. McCORMACK], the gentleman from North Carolina [Mr. DOUGHTON], and the gentleman from Massachusetts [Mr. MARTIN].

MESSAGE FROM THE SENATE

A message from the Senate, by Mr. Frazier, its legislative clerk, announced that the Senate had passed the following resolutions:

Senate Resolution 1

Resolved, That a committee consisting of two Senators be appointed to join such committee as may be appointed by the House of Representatives to wait upon the President of the United States and inform him that a quorum of each House is assembled and that the Congress is ready to receive any communication he may be pleased to make.

Pursuant to the foregoing resolution, the Vice President appointed Mr. BARKLEY and Mr. WHITE members of the committee on the part of the Senate.

Senate Resolution 2

Resolved, That the Secretary inform the House of Representatives that a quorum of the Senate is assembled and that the Senate is ready to proceed to business.

The message also announced that the Senate had passed a concurrent resolution of the following title, in which the concurrence of the House is requested:

Senate Concurrent Resolution 1

Concurrent resolution providing for a joint session on Saturday, January 6, 1945, to count the electoral votes for President and Vice President.

NOTIFICATION OF ELECTION OF SPEAKER AND CLERK

Mr. CANNON of Missouri. Mr. Speaker, I offer a resolution.
The Clerk read the resolution (H. Res. 4), as follows:

Resolved, That the Clerk be instructed to inform the President of the United States that the House of Representatives has elected SAM RAYBURN, a Representative from the State of Texas, Speaker, and South Trimble, a citizen of the State of Kentucky, Clerk, of the House of Representatives of the Seventy-ninth Congress.

The resolution was agreed to.

RULES OF THE HOUSE

Mr. SABATH. Mr. Speaker, I offer a resolution and ask for its immediate consideration.

The Clerk read the resolution (H. Res. 5), as follows:

Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.

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63. TAKING A BILL THROUGH CONGRESS; PASSAGE OVER VETO OF PRESIDENT

The chief steps in the passage of a bill through the House, through the Senate, and over the veto of the President may be traced in the reading below. As the House agreed to the Senate amendment (see House proceedings of Wednesday, January 22, 1936, below) a Conference Committee was not used in the passage of this particular bonus bill. For procedure making use of the important Conference Committee, see reading no. 64, *infra*. Excerpts below are taken from the *Congressional Record*, Volume 80, Part 1 (except the portions of House Report No. 1910 and of Senate Report No. 1465).

HOUSE OF REPRESENTATIVES

Tuesday, January 7, 1936

PUBLIC BILLS AND RESOLUTIONS

Under clause 3 of rule XXII, public bills and resolutions were introduced and severally referred as follows:

By Mr. VINSON of Kentucky: A bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes; to the Committee on Ways and Means.

REPORTS OF COMMITTEES ON PUBLIC BILLS AND RESOLUTIONS

Under clause 2 of rule XIII,

Mr. DOUGHTON: Committee on Ways and Means. H. R. 9870. A bill to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes; without amendment (Rept. No. 1910). Referred to the Committee of the Whole House on the state of the Union.

74th Congress
2d Session

HOUSE OF REPRESENTATIVES

Report
No. 1910

IMMEDIATE PAYMENT OF ADJUSTED-SERVICE CERTIFICATES

January 7, 1936.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. DOUGHTON, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H. R. 9870]

The Committee on Ways and Means, to whom was referred the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans

secured by such certificates, and for other purposes, having had the same under consideration, report favorably thereon without amendment and recommend that the bill do pass.

The bill (H. R. 9870) is the committee modification of the bill (H. R. 9500) to provide for the immediate payment of World War adjusted-service certificates, etc. The provisions of H. R. 9500 were carefully considered by your committee, certain changes made therein, and the amended provisions introduced as H. R. 9870.

HISTORY OF ADJUSTED-SERVICE CERTIFICATES

Almost 100 bills and resolutions were presented in the Sixty-sixth Congress to adjust the pay of the World War veterans. This was the Congress that began on March 4, 1919—the first Congress to convene after the World War.

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THE BILL H. R. 9870

This explanation of the bill, section by section, will be followed by a statement of the principal features and policies of the bill and of the reasons why the bill reduces by one-half the present cash outlay heretofore believed to be required to pay in full the adjusted-service certificates with cancelation of interest.

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CONCLUSION

Now, with hundreds of bills introduced, with years of effort expended, with other measures passing the House involving monetary changes, the World War veteran is still without his money. He has never received his adjusted pay. So your committee, convinced of the justice of immediate cash payment of the adjusted-service certificates, reports this measure to the House—H. R. 9870—and recommends its passage. It has the approval of the American Legion, the Veterans of Foreign Wars of the United States, and the Disabled American Veterans, as the best way to provide the immediate cash payment of the adjusted-service certificates with the least immediate burden on the Treasury.

In the judgment of the committee, immediate cash payment of the adjusted-service certificates will increase the purchasing power of the Nation. It believes that it is an essential part of the recovery program. That the present policy looking toward recovery argues strongly that this debt, which is just, due, and unpaid, should be paid in cash to the defenders of our country, who rendered the services and paid in their lifetime.

HOUSE OF REPRESENTATIVES

Thursday, January 9, 1936

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PAYMENT OF ADJUSTED-SERVICE CERTIFICATES

Mr. O'CONNOR. Mr. Speaker, I call up House Resolution 388, which I send to the desk and ask to have read.

The Clerk read as follows:

House Resolution 388

Resolved, That upon the adoption of this resolution it shall be in order to move that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of H. R. 9870, a bill to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes. That after general debate, which shall be confined to the bill and continue not to exceed 4 hours, to be equally divided and controlled by the chairman and ranking minority member of the Committee on Ways and Means, the bill shall be read for amendment under the 5-minute rule. At the conclusion of the reading of the bill for amendment the Committee shall rise and report the same to the House with such amendments as may have been adopted, and the previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion except one motion to recommit, with or without instructions.

Mr. O'CONNOR. Mr. Speaker, I yield 30 minutes to the gentleman from Pennsylvania [Mr. RANSLEY].

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The SPEAKER. The time of the gentleman from Indiana has expired.

Mr. O'CONNOR. Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

The SPEAKER. The question is on agreeing to the resolution.

The question was taken; and on a division (demanded by Mr. PATMAN) there were—ayes 148, noes 0.

So the resolution was agreed to.

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Mr. DOUGHTON. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the state of the Union for the consideration of the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes.

The motion was agreed to.

Accordingly the House resolved itself into the Committee of the Whole House on the state of the Union for the consideration of the bill H. R. 9870, with Mr. BLANTON in the chair.

The Clerk read the title of the bill.

Mr. DOUGHTON. Mr. Chairman, I ask unanimous consent that the first reading of the bill be dispensed with.

The CHAIRMAN. Is there objection?

There was no objection.

The CHAIRMAN. The gentleman from North Carolina is recognized for two hours.

Mr. DOUGHTON. Mr. Chairman, I yield 20 minutes to the gentleman from Kentucky [Mr. VINSON].

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The CHAIRMAN. Debate has been exhausted on this amendment.

The question is on the amendment offered by the gentleman from Massachusetts [Mr. TREADWAY].

The question was taken; and on a division (demanded by Mr. TREADWAY) there were ayes 48 and noes 116.

Mr. TREADWAY. Mr. Chairman, I ask for tellers.

Tellers were ordered; and the Chair appointed Mr. TREADWAY and Mr. DOUGHTON to act as tellers.

The Committee again divided; and the tellers reported there were ayes 43 and noes 118.

So the amendment was rejected.

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The CHAIRMAN. Under the rule, the Committee rises.

Accordingly, the Committee rose; and the Speaker having resumed the chair, Mr. BLANTON, Chairman of the Committee of the Whole House on the state of the Union, reported that that Committee, having had under consideration the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, pursuant to House Resolution 388, he reported the same back to the House.

The SPEAKER. Under the rule, the previous question is ordered on the bill.

The bill was ordered to be engrossed, read a third time, and was read the third time.

Mr. TREADWAY. Mr. Speaker, I offer a motion to recommit.

The Clerk read as follows:

Mr. TREADWAY moves to recommit the bill H. R. 9870 to the Committee on Ways and Means with instructions to report the same back to the House forthwith with the following amendment:

Page 7, line 13, after the word "appropriated", insert the following: "out of any unexpended balances heretofore appropriated or made available for emergency purposes."

Mr. DOUGHTON. Mr. Speaker, I move the previous question on the motion to recommit.

The previous question was ordered.

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HOUSE OF REPRESENTATIVES

Friday, January 10, 1936

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The SPEAKER. The unfinished business is the vote on the motion to recommit submitted by the gentleman from Massachusetts [Mr. TREADWAY].

The question was taken; and on a division (demanded by Mr. TREADWAY) there were—ayes 63, noes 206.

Mr. TREADWAY. Mr. Speaker, I demand the yeas and nays.

The yeas and nays were ordered.

The question was taken; and there were—yeas 89, nays 319, not voting 22, as follows:

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So the motion to recommit was rejected.

The Clerk announced the following pairs:

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The SPEAKER. The question is on the passage of the bill.

Mr. DOUGHTON. Mr. Speaker, on that I ask for the yeas and nays.

The yeas and nays were ordered.

The question was taken; and there were—yeas 356, nays 59, not voting 16, as follows:

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On motion of Mr. DOUGHTON, a motion to reconsider the vote by which the bill was passed was laid on the table.

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SENATE

Thursday, January 9, 1936

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Mr. THOMAS of Oklahoma. Mr. President, another body of the Congress is now considering the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancellation of unpaid interest accrued on loans secured by such certificates, and for other purposes. Inasmuch as this bill will probably be acted upon by the other body within the next day or two, and will then come to the

Senate, and because of the general interest in the measure throughout the country, I ask unanimous consent that the bill as reported by the Ways and Means Committee of the House of Representatives be printed in the RECORD at this point in connection with my remarks.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Oklahoma? The Chair hears none, and it is so ordered.

The bill (H. R. 9870) to provide for the immediate payment of the World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, as reported by the Committee on Ways and Means of the House of Representatives, is as follows:

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Mr. THOMAS of Oklahoma. Mr. President, reserving the opportunity for further discussion of this bill, I wish to call the attention of the Senate to section 7, which reads as follows:

There is hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this act.

Mr. President, if this bill should pass the two bodies of the Congress and thereafter should be approved by the President, the veterans would simply have an authorization bill upon the statute books, with not a single penny anywhere available to meet the payment, although the bill recites in its title that it is a bill "to provide for the immediate payment of the World War adjusted-service certificates." As the bill carries no appropriation at this time, I ask unanimous consent to offer an amendment to be known as title II to the House bill, which probably will be in the Senate very shortly, and I ask that the amendment as submitted be printed in the RECORD following the text of the House bill, and that the amendment be otherwise printed and referred to the Committee on Finance.

The PRESIDING OFFICER. Is there objection to the request of the Senator from Oklahoma? The Chair hears none, and it is so ordered.

The amendment intended to be proposed by Mr. THOMAS of Oklahoma was referred to the Committee on Finance, ordered to be printed, and to be printed in the RECORD, as follows:

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SENATE

Monday, January 13, 1936

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Mr. HARRISON. Mr. President, I introduce a bill which I ask may be referred to the Committee on Finance.

The bill represents the composite views of many who have been working on the bonus question. The Senator from South Carolina [Mr.

BYRNES], the Senator from Missouri [Mr. CLARK], and the Senator from Oregon [Mr. STEIWER] join me in the introduction of the bill. It has the approval of the leader on the Democratic side.

Mr. THOMAS of Oklahoma. Mr. President, I ask unanimous consent that the bill just introduced by the Senator from Mississippi and other Senators be printed in the RECORD.

There being no objection, the bill (S. 3653) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, was read twice by its title, referred to the Committee on Finance, and ordered to be printed in the RECORD, as follows:

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Mr. SCHWELLENBACH submitted an amendment intended to be proposed by him to the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, which was referred to the Committee on Finance and ordered to be printed.

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SENATE

Thursday, January 16, 1936

REPORT FILED DURING ADJOURNMENT OF SENATE

The VICE PRESIDENT laid before the Senate a letter from the Secretary of the Senate, which was read and ordered to lie on the table, as follows:

January 16, 1936

To the President of the Senate:

Under the order of the Senate of the 13th instant, committee reports were filed with me as Secretary of the Senate as follows:

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On January 15, 1936:

By Mr. HARRISON, from the Committee on Finance, with an amendment, the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, with an accompanying report (No. 1465).

Very respectfully,

E. A. HALSEY,
Secretary of the Senate.

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Calendar No. 1526

74th Congress
2d Session

SENATE

Report
No. 1465

PAYMENT OF ADJUSTED-SERVICE CERTIFICATES

January 15, 1936.—Ordered to be printed

Mr. HARRISON, from the Committee on Finance, submitted the following

R E P O R T

[To accompany H. R. 9870]

The Committee on Finance, to whom was referred the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill be passed.

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SENATE

Thursday, January 16, 1936

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PAYMENT OF ADJUSTED-SERVICE CERTIFICATES

The VICE PRESIDENT. The morning business is closed.

Mr. HARRISON. Mr. President, I desire to make a brief statement, to which I invite the attention of the Senator from Oregon [Mr. McNARY].

I was very anxious to have taken up and considered this morning House bill 9870, providing for the payment of adjusted-service certificates. The Senator from Oregon spoke to me and expressed a desire that the bill go over until tomorrow.

I appreciate the fact that some special orders have been entered into with regard to the session of today. I do not desire to inconvenience any Senator, nor to press the bill if certain Senators desire to read the report, and so forth. I ask the Senator from Oregon whether there is any objection to taking up the so-called "bonus" bill today for consideration.

Mr. McNARY. Mr. President, there has been an unbroken practice, which I have followed, of objecting to the consideration of any bill until it has lain over a day under the rule. By virtue of the unanimous-consent agreement entered into on Monday, I think probably that rule has been violated; but, in all fairness to the Members of this body, I think the bill should lie over in order that an opportunity may be had to read the report.

Therefore, I shall object to the consideration of the bill today, as I should in the case of any other bill.

Mr. HARRISON. I may say to the Senator that I have no doubt the committee has complied with the rules with reference to filing the report on the bill. Not only has that been done, but we have rushed the Government Printing Office in order that the members of the Finance Committee might receive on yesterday afternoon copies of a hearing of a confidential nature and a report on the bill. So I think we have complied with the rules. Since the Senator feels as he does, however, would he object to entering into a unanimous-consent agreement that we may take up this measure immediately after the convening of the Senate at 12 o'clock noon tomorrow?

Mr. McNARY. Mr. President, I stated specifically and definitely my objection to the consideration of the bill today, as I would in the case of any other bill that might come up under the same circumstances. I have no objection to a speedy consideration of the bill. So far as I am personally concerned, I am willing to take it up at any time after today; but I insist that it shall not come before the Senate today.

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SENATE

Friday, January 17, 1936

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The VICE PRESIDENT. According to the order of the Senate, the Chair lays before the Senate House bill 9870.

The Senate proceeded to consider the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, which had been reported from the Committee on Finance with an amendment to strike out all after the enacting clause and insert the following:

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Mr. HARRISON. Mr. President, I desire to make a brief statement explaining this bill and pointing out the differences between it and the bill recently passed by the House of Representatives, known as the Vinson bill.

The bill passed by the House provides for full cash payment of the adjusted-service certificates. It cancels all interest charges. The bill reported by the Senate Finance Committee, and now before the Senate, was substituted for the Vinson bill without a dissenting vote in the Finance Committee, the vote being 18 to 0.

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Mr. HARRISON. Mr. President, I feel quite sure that we cannot make any further progress this afternoon, many of the Senators having

left the Chamber, and being anxious to dispose of the pending legislation as soon as possible, I submit the following request for unanimous consent.

The PRESIDING OFFICER. The clerk will read.

The legislative clerk read as follows:

I ask unanimous consent that when the Senate concludes its business today it take a recess until 12 o'clock noon tomorrow; and that after the hour of 2 o'clock p. m. tomorrow no Senator shall speak more than once or longer than 15 minutes on the pending bill, or more than once or longer than 30 minutes on any amendment to or motion relating to the bill.

Mr. McNARY. Mr. President, I think I may speak for the Republican Members of the Senate. I hope the request will be agreed to.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

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SENATE

Saturday, January 18, 1936

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The Senate resumed the consideration of the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes.

The VICE PRESIDENT. The Chair had an understanding that he would recognize the Senator from Missouri [Mr. CLARK] in connection with an arrangement with the Senator from Mississippi and by unanimous consent; but the Chair does not see the Senator from Missouri present.

Mr. THOMAS of Oklahoma. Mr. President, I had the floor when the Senate adjourned last night. I have no objection, however, to the course suggested.

The VICE PRESIDENT. The Chair does not see the Senator from Missouri present, so he recognizes the Senator from Oklahoma.

Mr. THOMAS of Oklahoma. Mr. President, when the Senate recessed last evening I had just offered an amendment to the pending bill. The amendment was not read, but it has been twice printed in the RECORD, so I take it for granted that the amendment is now pending before the Senate.

The VICE PRESIDENT. The amendment offered by the Senator from Oklahoma is the pending question in connection with the consideration of the so-called "bonus" bill.

Mr. THOMAS of Oklahoma. Mr. President, a parliamentary inquiry.

The VICE PRESIDENT. The Senator will state it.

Mr. THOMAS of Oklahoma. Am I correct in my assumption that at 2 o'clock the unanimous-consent agreement comes into force, and after

that time no Senator may speak longer than 15 minutes on an amendment or more than once or longer than 30 minutes on the bill?

The VICE PRESIDENT. The Senator has the terms of the agreement reversed. A Senator may speak no longer than 15 minutes on the bill, but he may speak 30 minutes on an amendment, as the Chair understands the agreement.

Mr. THOMAS of Oklahoma. And that agreement comes into force at 2 o'clock this day?

The VICE PRESIDENT. The Senator from Oklahoma is correct.

Mr. THOMAS of Oklahoma. I shall occupy just as little time as possible, but I wish to place in the RECORD a few additional facts, so that the RECORD will show, at least, that the Senate had a chance to know what it is voting on when the vote comes upon the pending amendment.

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Mr. HARRISON. Mr. President, if no other Senator desires to speak on the amendment, I hope very much we may have a vote on it now.

The PRESIDENT pro tempore. The question is on agreeing to the amendment offered by the Senator from Oklahoma [Mr. THOMAS] to the committee amendment.

Mr. THOMAS of Oklahoma. I suggest the absence of a quorum.

The PRESIDENT pro tempore. The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

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The PRESIDENT pro tempore. Ninety-two Senators having answered to their names, a quorum is present. The question is on agreeing to the amendment offered by the Senator from Oklahoma [Mr. THOMAS] to the committee amendment in the nature of a substitute.

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The PRESIDENT pro tempore. The question is on the amendment of the Senator from Oklahoma [Mr. THOMAS] to the amendment reported by the committee.

Mr. THOMAS of Oklahoma. I ask for the yeas and nays.

The yeas and nays were ordered, and the Chief Clerk called the roll.

Mr. AUSTIN. I announce the necessary absence of the Senator from Rhode Island [Mr. METCALF]. If present, he would vote "nay" on this question.

Mr. LEWIS. I rise to reannounce the absence of the Senator from Washington [Mr. BONE] by reason of attending the funeral of the late Representative Lloyd, of Washington, and the absence of the Senator from Maryland [Mr. TYDINGS], who is necessarily detained.

The result was announced—yeas 27, nays 64, as follows:

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So the amendment of Mr. THOMAS of Oklahoma to the committee amendment was rejected.

Mr. THOMAS of Oklahoma. Mr. President, the Senate has just decided to pay the bonus through a bond issue. The bill now before the Senate provides an authorization for an appropriation necessary to cash the certificates. The bill does not provide for an appropriation. At this time I offer an amendment to follow the authorization section, making the appropriation necessary to finance this payment.

The PRESIDENT pro tempore. The amendment to the committee amendment will be reported.

The LEGISLATIVE CLERK. In the amendment of the committee, on page 14, after line 11, it is proposed to insert the following:

SEC. 8½. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$2,237,000,000, or so much thereof as may be necessary, to pay the balance due on the adjusted-service certificates as authorized in section 8 of this act.

Mr. HARRISON. Mr. President, I do not know whether or not a point of order would lie against the amendment. I make the point of order to raise the question.

The PRESIDENT pro tempore. On what ground is the point of order made?

Mr. HARRISON. It has been the practice that appropriation bills should originate in the House. That is where they should originate. I have no doubt, if the bill providing an authorization shall pass and become a law, that the necessary appropriation will be made to carry out its purposes. However, I withdraw the point of order and express the hope that the amendment will not be agreed to.

The PRESIDENT pro tempore. The question is on agreeing to the amendment of the Senator from Oklahoma to the amendment of the committee.

The amendment to the amendment was rejected.

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Mr. HARRISON. Mr. President, if this matter is going to provoke further discussion, may I interrupt for the moment? I understand one other amendment is to be offered, and I do not know how long the discussion of that amendment will proceed. I do not desire to impose on the Senate and to keep Senators here extraordinarily late. Personally I should rather stay and finish up the matter tonight.

The PRESIDENT pro tempore. The Senator from Texas has asked for the yeas and nays on his amendment to the amendment. Is the demand seconded?

The yeas and nays were not ordered.

The PRESIDENT pro tempore. The question is on agreeing to the amendment of the Committee on Finance in the nature of a substitute.

The amendment of the committee was agreed to.

Mr. KING. Mr. President, in the confusion I was not able to hear the question as propounded by the Chair.

The PRESIDENT pro tempore. The question was on agreeing to the committee amendment.

Mr. KING. I have an amendment I desire to offer.

Mr. HARRISON. I ask that the vote by which the committee amendment was agreed to be reconsidered.

The PRESIDENT pro tempore. Without objection, the vote is reconsidered.

Mr. KING. Mr. President, I desire to offer an amendment, and I ask that the amendment be read.

The PRESIDENT pro tempore. The clerk will read.

The CHIEF CLERK. In lieu of the amendment proposed by the committee it is proposed to insert the following:

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Mr. BORAH. Mr. President, may I ask the Senator in charge of the bill whether it is his purpose to have a final vote on the bill today, in view of the offering of this amendment?

Mr. HARRISON. I was merely expressing my own idea. I had hoped that we could finish the bill tonight, but if it is the sentiment of Senators that they desire to have it go over until Monday, I am perfectly willing to abide by the wishes of the Senate. This is about the last amendment to be offered, I may say.

Mr. NORRIS. I submit a parliamentary inquiry.

The PRESIDENT pro tempore. The Senator will state it.

Mr. NORRIS. The committee amendment is offered in the nature of a substitute. Is it in order now for the Senator from Utah to offer a substitute for the committee substitute?

The PRESIDENT pro tempore. It is in order.

Mr. HARRISON. I do not know of any other way to answer the Senator from Idaho.

Mr. BORAH. The certificates could not be cashed tonight even if we passed the bill, so I do not think we will lose anything by waiting until Monday.

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SENATE

Monday, January 20, 1936

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The Senate resumed the consideration of the bill (H. R. 9870) to provide for the immediate payment of the World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes.

The VICE PRESIDENT. The question now is on the amendment offered by the Senator from Utah [Mr. KING] in the nature of a substitute for the amendment reported by the committee.

Mr. KING. Mr. President, I appreciate the fact that Senators are impatient to vote upon the pending measure. . . .

Mr. KING. I ask permission to have printed in the RECORD as part of my remarks an editorial from the Christian Science Monitor, one of the leading newspapers of the United States, whose editorials upon public questions are illuminating and instructive.

The PRESIDENT pro tempore. Without objection, it is so ordered. The editorial from the Christian Science Monitor is as follows:

Mr. HARRISON. Mr. President, I move to amend section 4 by striking out the words "or multiples thereof" appearing at the end of line 21, page 11. By striking out the words "or multiples thereof" then all these bonds will be in denominations of \$50.

The PRESIDENT pro tempore. The question is on the amendment offered by the Senator from Mississippi to the amendment reported by the committee.

The amendment to the amendment was agreed to.

Mr. HARRISON. I have one further amendment.

Mr. CONNALLY. Mr. President, I wish to make a motion before these amendments are all disposed of.

The PRESIDENT pro tempore. The Senator from Mississippi has the floor. Does he yield to the Senator from Texas?

Mr. CONNALLY. Does the Chair recognize one Senator to offer a half dozen amendments before recognizing any other Senator?

Mr. HARRISON. I may say that this is the only amendment I have. The amendment I now intend to offer will not require any discussion. If it shall, I will withdraw it.

The PRESIDENT pro tempore. The Senator from Mississippi has the floor.

Mr. HARRISON. Mr. President, there is no penalty provision in this bill. It has been suggested by the Department that a penalty provision should be in it. So I offer the amendment which I send to the desk.

The PRESIDENT pro tempore. The amendment to the committee amendment will be stated.

The LEGISLATIVE CLERK. At the end of the committee amendment it is proposed to insert a new section, as follows:

SEC. 11. Whoever knowingly makes any false or fraudulent statement of a material fact in any application, certificate, or document made under the provisions of this act, or of any regulation made under this act, shall upon

conviction thereof be fined not more than \$1,000 or imprisoned not more than 5 years, or both.

The PRESIDING OFFICER. The question is on agreeing to the amendment reported by the committee, as amended.

The amendment, as amended, was agreed to.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill was read the third time.

The PRESIDING OFFICER. The question is, Shall the bill pass?

Mr. HARRISON. I ask for the yeas and nays.

The yeas and nays were ordered, and the legislative clerk proceeded to call the roll.

Mr. FLETCHER (when his name was called). On this vote I have a pair with the Senator from Montana [Mr. WHEELER]. If he were present, he would vote "yea." If I were permitted to vote, I should vote "nay."

The roll call was concluded.

Mr. LEWIS. I have had occasion today to announce the absence of the Senator from Maryland [Mr. TYDINGS]. I reannounce his absence. I do not know how he would vote, if present; but the Senator from Montana [Mr. WHEELER], who was suddenly called to Chicago on official business, authorized me to say that if he were present he would vote "yea." As has been stated, he is paired with the Senator from Florida. . . .

The result was announced—yeas 74, nays 16, as follows:

So the bill passed.

Mr. GEORGE. I move to reconsider the vote by which the Senate passed House bill 9870, the so-called "bonus" bill, as amended.

Mr. HARRISON. I move to lay the motion on the table.

The motion to lay on the table the motion to reconsider was agreed to.

HOUSE OF REPRESENTATIVES

Wednesday, January 22, 1936

Mr. DOUGHTON. Mr. Speaker, I ask unanimous consent for the consideration of House Resolution 401, which I send to the Clerk's desk.

The Clerk read as follows:

House Resolution 401

Resolved, That immediately upon the adoption of this resolution the bill H. R. 9870, with the Senate amendment thereto, be, and the same hereby

is, taken from the Speaker's table to the end that the Senate amendment be, and the same is hereby, agreed to.

The SPEAKER. Is there objection to the request of the gentleman from North Carolina?

Mr. SNELL. Reserving the right to object, and I do not intend to object, I understand probably the gentleman from North Carolina will give some reasonable time for debate, as there are a few Members who desire to express their opinions on this subject?

Mr. DOUGHTON. That is the purpose of the chairman.

Mr. SWEENEY. Reserving the right to object, I wish to propound a parliamentary inquiry.

The SPEAKER. The gentleman will state it.

Mr. SWEENEY. If this is carried, will it foreclose the right of the Patman forces to present their issue—that is, the plan for paying this obligation?

The SPEAKER. The Patman bill is now upon the Union Calendar.

Mr. SWEENEY. But this will be tantamount to concurrence in the Senate bill?

The SPEAKER. The Chair is not passing on the effect of the resolution. The gentleman will have to pass on that himself.

Is there objection to the request of the gentleman from North Carolina [Mr. DOUGHTON]?

There was no objection.

The SPEAKER. The gentleman from North Carolina is recognized for 1 hour.

Mr. DOUGHTON. Mr. Speaker, I yield 10 minutes to the gentleman from Kentucky [Mr. VINSON].

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Mr. DOUGHTON. Mr. Speaker, I yield such time as he may desire to the gentleman from Pennsylvania [Mr. ELLENBOGEN].

Mr. DOUGHTON. Mr. Speaker, we are nearing the time when the last vote will be taken on the question of payment of the adjusted-service certificates. I hope the resolution I have presented today will be overwhelmingly, if not unanimously, adopted.

There is very little difference between the bill passed by the House some days ago, the Vinson-McCormack-Patman bill, and the Senate amendment of the House bill. They both provide for the veterans getting their money, and that is what we are driving at; that is what we are anxious to do.

The bill as passed by the Senate appears to be satisfactory to those who represent the soldiers, especially the organizations. The American Legion, the Veterans of Foreign Wars, and the Disabled American Veterans all say this bill is satisfactory to the veterans; and it is, in my judgment, also fair to the Government.

It is maintained by some that it is more than the original contract. Perhaps this is true so far as some interest is concerned; but, in my judgment, it is no more than the original contract should have been. The soldiers were compelled to accept this settlement. They never have been satisfied with it. They now say they will be satisfied with the settlement proposed in the bill under consideration.

It is said by others that this is a hard time for the Government to pay this bonus; and it is, with the many demands, extra demands upon our Government for relief and recovery purposes. We all realize that it is a hard time for the Government to meet this obligation; but, Mr. Speaker, it is much harder for the American veterans in distress to go without this assistance than it is for the Government to pay it at this time; and I hope this resolution will be overwhelmingly adopted.

Mr. HEALEY. Mr. Speaker, will the gentleman yield?

Mr. DOUGHTON. I yield.

Mr. HEALEY. There is no provision in the Senate amendment which confers any benefit on the veterans for retaining their present adjusted-service certificates.

Mr. DOUGHTON. Not for retaining them, but if they hold the bonds provided in this bill, they will draw 3-percent interest.

Mr. Speaker, I move the previous question on the adoption of the resolution.

The previous question was ordered.

The SPEAKER. The question is on the adoption of the resolution.

Mr. DOUGHTON. Mr. Speaker, I demand the yeas and nays.

The yeas and nays were ordered.

The Clerk called the roll; and there were—yeas 346, nays 59, answered “present” 1, not voting 25, as follows:

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The SPEAKER. The Clerk will call my name.

The Clerk called the name of Mr. BYRNS, and he voted “aye.”

So the resolution was agreed to.

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Mr. DOUGHTON. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to extend their remarks in the RECORD on the measure just passed.

The SPEAKER. Is there objection to the request of the gentleman from North Carolina?

There was no objection.

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Mr. PARSONS, from the Committee on Enrolled Bills, reported that the committee had examined and found truly enrolled a bill of the House of the following title, which was thereupon signed by the Speaker:

H. R. 9870. An act to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes.

SENATE

Wednesday, January 22, 1936

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MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Chaffee, one of its reading clerks, announced that the House had agreed to the amendment of the Senate to the bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes.

ENROLLED BILL SIGNED

The message also announced that the Speaker had affixed his signature to the enrolled bill (H. R. 9870) to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, and it was signed by the Vice President.

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HOUSE OF REPRESENTATIVES

Wednesday, January 22, 1936

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Mr. PARSONS, from the Committee on Enrolled Bills, reported that that committee did on this day present to the President, for his approval, bills of the House of the following titles:

H. R. 6137. An act for the relief of the Otto Misch Co.; and

H. R. 9870. An act to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes.

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HOUSE OF REPRESENTATIVES

Friday, January 24, 1936

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MESSAGE FROM THE PRESIDENT

A message in writing from the President of the United States was communicated to the House by Mr. Latta, one of his secretaries.

PAYMENT OF ADJUSTED-SERVICE CERTIFICATES

(H. DOC. NO. 398)

The SPEAKER laid before the House the following veto message from the President of the United States, which was read:

To the House of Representatives:

I return herewith, without my approval, H. R. bill 9870, entitled "An act to provide for the immediate payment of World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes."

On May 22, 1935, in disapproving a bill to pay the bonus in full immediately instead of in 1945, I gave in person to a joint session of the Congress complete and explicit reasons for my action.

The bill I now return differs from last year's bill in only two important respects: First, it eliminates the issuance of unsecured paper currency to make the payments required and substitutes interest-bearing bonds, which, however, may be converted into cash for face value at any time; second, it adds \$263,000,000 to the total payments by forgiving interest after October 1, 1931, on amounts borrowed.

In all other respects, the circumstances, arguments, and facts remain essentially the same as those fully covered and explained by me only 8 months ago.

I respectfully refer the Members of the Senate and of the House of Representatives to every word of what I said then.

My convictions are as impelling today as they were then. Therefore I cannot change them.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE, *January 24, 1936.*

The SPEAKER. The objections of the President will be spread at large upon the Journal, and the bill and message will be printed as a House document.

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The SPEAKER. The question is, Will the House on reconsideration agree to pass the bill, the objections of the President to the contrary notwithstanding?

Mr. RANKIN. On that, Mr. Speaker, I move the previous question.

The previous question was ordered.

The SPEAKER. Under the Constitution the vote is taken by yeas and nays. Those who favor the passage of the bill, the objections of the President to the contrary notwithstanding, will vote "aye" when their names are called; those who oppose will vote "no." The Clerk will call the roll.

The question was taken; and there were—yeas, 326, nays 61, answered "present" 2, not voting 41, as follows:

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So (two-thirds having voted in favor thereof) the bill was passed, the objections of the President to the contrary notwithstanding.

The Clerk announced the following pairs:

Mr. Patman and Mr. Risk (for) with Mr. Wadsworth (against).
 Mr. McFarlane and Mr. Clark of North Carolina (for) with Mr. Corning (against).
 Mr. Doughton and Mr. Holmes (for) with Mr. Treadway (against).

General pairs:

Mr. Oliver with Mr. Thomas.
 Mr. Fernandez with Mr. Fenerty.
 Mr. Wilson of Louisiana with Mr. Stewart.
 Mr. Lewis of Maryland with Mr. Wolfenden.
 Mr. Maverick with Mr. McLeod.
 Mr. Thom with Mr. Bell.
 Mr. Maloney with Mr. Zioncheck.
 Mr. Sandlin with Mr. McGroarty.
 Mr. Montet with Mr. Brennan.
 Mr. Hennings with Mr. Dear.

Mr. WADSWORTH. Mr. Speaker, on this motion I voted in the affirmative. However, I have a pair with the gentleman from Texas, Mr. PATMAN, and the gentleman from Rhode Island, Mr. RISK. Were they present, they would have voted "aye." Under these circumstances I must withdraw my vote and desire to be recorded "present."

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SENATE

Monday, January 27, 1936

(*Legislative day of Thursday, Jan. 16, 1936*)

The Senate met at 12 o'clock m., on the expiration of the recess.

JESSE H. METCALF, a Senator from the State of Rhode Island, appeared in his seat today.

THE JOURNAL

On request of Mr. ROBINSON, and by unanimous consent, the reading of the Journal of the proceedings of the calendar day Thursday, January 23, 1936, was dispensed with, and the Journal was approved.

MESSAGES FROM THE PRESIDENT

Messages in writing from the President of the United States were communicated to the Senate by Mr. Latta, one of his secretaries.

MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Haltigan, one of its reading clerks, announced that the House, having proceeded to reconsider the bill (H. R. 9870) to provide for the immediate payment of

World War adjusted-service certificates, for the cancelation of unpaid interest accrued on loans secured by such certificates, and for other purposes, returned by the President of the United States, with his objections, to the House of Representatives, in which it originated; it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

PAYMENT OF ADJUSTED-SERVICE CERTIFICATES—VETO

Mr. HARRISON. I ask the Chair to lay before the Senate the veto message of the President of the United States with reference to the so-called bonus bill.

The VICE PRESIDENT. The Chair lays before the Senate a message from the President of the United States, which will be read.

The legislative clerk read as follows:

The VICE PRESIDENT. The Chair lays before the Senate the action of the House of Representatives with reference to the veto message, which will be read.

The legislative clerk read as follows:

Mr. KING. I move that the veto message just read by the clerk be referred to the Committee on the Judiciary.

Mr. HARRISON. I move to lay on the table the motion of the Senator from Utah.

The VICE PRESIDENT. The question is on the motion of the Senator from Mississippi [Mr. HARRISON] to lay on the table the motion of the Senator from Utah [Mr. KING].

The motion was agreed to.

The VICE PRESIDENT. The question is, Shall the bill pass, the objections of the President of the United States to the contrary notwithstanding?

Mr. KING. Mr. President, you have just heard read the message of the President dated the 24th instant, in which he returns without his approval H. R. 9870, known as the soldiers' "bonus" measure.

It is possible there may be some individuals who entertain the view that the veto message should have been longer and should have critically examined and condemned the provisions of the bill referred to. However, the President, in the message before us, specifically directs the attention of the Members of the Senate and the House to his veto message of May 22, 1935, in which he disapproved of the bonus bill which the House and the Senate passed.

In the message just read the President declared that he gave explicit reasons for his veto of that bill, and states that—

With the exception of two provisions, the circumstances, arguments, and facts remain essentially the same as those fully covered and explained by me only 8 months ago.

He states that his convictions are as compelling today as they were then. In other words, the veto message of May 22, 1935, represents the views of the President with respect to the measure now before us, and the reasons therein set forth are the basis for his disapproval of the message now before us

Mr. President, I request that the clerk read the message of May 22, 1935, because it is possible that some Senators have forgotten the invincible reasons then assigned by the President for his disapproval of the bonus bill.

No one has attempted to answer the facts and reasons assigned by the President for his disapproval of the measure referred to. His arguments are unanswerable; the message was one of the most powerful ever delivered by any President. It has often been stated by opponents of the President, as well as by his supporters, that his so-called economy message to the Congress and the veto message of May 22, 1935, not only were convincing but were enthusiastically approved by millions of the American people.

I can scarcely believe that Senators who voted to sustain the action of the President in disapproving the bonus bill in May 1935 can give their support to the bill now before us, and which has been returned disapproved by the President. If the President was right in vetoing the former bonus bill, he is right in vetoing the pending measure. Senators who have urged that we "follow the President" have an opportunity now to demonstrate the sincerity of their appeals.

Since the veto message of May last conditions have arisen which strengthen and fortify the position then taken by the President and which supply additional reasons for the disapproval of the pending bill. It is certain that the expenditures of the Government for the next fiscal year will be larger than anticipated and will exceed the Budget estimates. The deficit for the next fiscal year will be of greater magnitude than was thought possible, and will require additional revenues which must be met by increased taxation, or stupendous bond issues which will retard recovery and disturb the economic and financial conditions of the country. To add more than \$2,500,000,000 to the public debt, as contemplated by the bill before us, will prove disturbing to our industrial and financial situation if it does not seriously impair the credit of the Government.

I request that the veto message of May 22 be read by the clerk.

The VICE PRESIDENT. Without objection, the clerk will read, as requested.

The Chief Clerk read as follows:

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The VICE PRESIDENT. Ninety-five Senators have answered to their names. A quorum is present. The question is, Shall the bill pass,

the objections of the President of the United States to the contrary notwithstanding?

Mr. McNARY. I call for the yeas and nays.

The VICE PRESIDENT. The clerk will call the roll.

The legislative clerk called the roll, which resulted—yeas 76, nays 19, as follows:

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The VICE PRESIDENT. Senators, the Chair should like to be permitted to make an observation before announcing the result of the vote. There are at present 95 Members of the Senate. This is the first time since the present occupant of the chair has been Presiding Officer of the Senate that all Senators have been in their seats and have voted when the roll was called. The Chair congratulates the Members of the Senate on their good health.

On this question the yeas are 76, the nays are 19. More than two-thirds of the Senators have voted in the affirmative, the bill is passed. [Applause in the galleries.]

64. A CONFERENCE COMMITTEE

The important part in legislation played by a Conference Committee is reflected in the following excerpts taken from the *Congressional Record*, Volume 90, Part 1. For a recommendation on limitation of Conference reports, see reading no. 66, *infra*, section I:7.

SENATE

Friday, January 21, 1944

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The PRESIDING OFFICER. The bill having been read the third time, the question now is, Shall the bill pass?

The bill H. R. 3687 was passed.

Mr. GEORGE. Mr. President, I move that the Senate insist on its amendments, request a conference with the House thereon, and that the Chair appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed Mr. GEORGE, Mr. WALSH of Massachusetts, Mr. BARKLEY, Mr. CONNALLY, Mr. LA FOLLETTE, Mr. VANDENBERG, and Mr. DAVIS, conferees on the part of the Senate.

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HOUSE OF REPRESENTATIVES

Monday, January 24, 1944

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REVENUE BILL

Mr. DOUGHTON. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H. R. 3687) to provide revenue, and

for other purposes, with Senate amendments thereto, disagree to the Senate amendments, and agree to the conference asked by the Senate.

The SPEAKER. Is there objection to the request of the gentleman from North Carolina?

There was no objection.

The SPEAKER appointed the following conferees: Messrs. DOUGHTON, CULLEN, COOPER, DISNEY, KNUTSON, REED of New York, and WOODRUFF of Michigan.

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Monday, February 7, 1944
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Mr. DOUGHTON. Mr. Speaker, I call up the conference report upon the bill (H. R. 3687) to provide revenue, and for other purposes, and ask unanimous consent that the statement be read in lieu of the report.

The SPEAKER. Is there objection to the request of the gentleman from North Carolina?

There was no objection.

(The Clerk proceeded to read the statement of the conferees.)

The conference report and statement are as follows:

CONFERENCE REPORT

The committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 3687) to provide revenue, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its amendments numbered 2, 33, 52, 54, 56, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 140, 165, 185, 187, 200, 211, 214, 215, 222, 223, 224, 226, 227, 228, 250, 253, 276, 279, 285, 286, 292, 294, 304, 305, and 306.

That the House recede from its disagreement to the amendments of the Senate numbered 3, 4, 5, 7, 20, 21, 22, 23, 24, 25, 26, 28, 38, 39, 41, 42, 43, 44, 45, 46, 48, 50, 51, 59, 60, 62, 63, 64, 65, 66, 74, 75, 76, 77, 78, 79, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 123, 124, 125, 127, 128, 130, 131, 132, 133, 134, 136, 137, 138, 139, 141, 142, 143, 145, 146, 147, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 181, 182, 183, 184, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 201, 209, 210, 216, 217, 218, 219, 220, 221, 225, 229, 230, 231, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 251, 254, 255, 256, 257, 258, 259, 261, 262, 263, 264, 265, 266, 267, 269, 270, 271, 272, 273, 274, 275, 277, 278, 280, 281, 283, 284, 287, 288, 289, 291, 293, 297, 298, 300, 302, 303, 307, and 308, and agree to the same.

Amendment numbered 1: That the House recede from its disagreement to the amendment of the Senate numbered 1, and agree to the same with an amendment as follows:

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Beginning in line 23, on page 105 of the Senate engrossed amendments, strike out "trust fund" and insert "Trust Fund"; and the Senate agree to the same.

R. L. DOUGHTON,
THOS. H. CULLEN,
JERE COOPER,
WESLEY E. DISNEY,

HAROLD KNUTSON,
DANIEL A. REED,
ROY O. WOODRUFF,

Managers on the part of the House.

WALTER F. GEORGE,
DAVID I. WALSH,
ALBEN W. BARKLEY,
TOM CONNALLY,

ROBERT M. LA FOLLETTE,
A. H. VANDENBERG,
JAMES J. DAVIS,

Managers on the part of the Senate.

STATEMENT

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 3687) to provide revenue, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

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The House recedes with clerical amendments.

R. L. DOUGHTON,
THOS. H. CULLEN,
JERE COOPER,
WESLEY E. DISNEY,

HAROLD KNUTSON,
DANIEL A. REED,
ROY O. WOODRUFF,

Managers on the part of the House.

Mr. DOUGHTON (interrupting the reading). Mr. Speaker, I ask unanimous consent that the further reading of the statement be dispensed with.

The SPEAKER. Is there objection?

Mr. DISNEY. Mr. Speaker, reserving the right to object, in that connection I call attention to page 86 of the conference report, line 10, wherein it states "the Senate recedes." That is a clerical error, a printing error. It should be "the House recedes."

The SPEAKER. Is there objection to the request of the gentleman from North Carolina that the further reading be dispensed with?

There was no objection.

Mr. DOUGHTON. Mr. Speaker, the bill before us yields about \$2,300,000,000 of additional revenue, about five hundred million plus of that from increase in corporate taxes, about six hundred million from an increase in individual income taxes, and about \$1,000,000,000 increase in excise taxes, with \$100,000,000 increase in postal rates.

In general the Senate was in agreement with the main provisions of

the House bill. The Senate was in agreement that at this time there should not be any increase in the rate on individual incomes, and substantially the same so far as rates on corporate incomes were concerned. I do not know that I care to make any general statement in explanation of the bill unless some Member desires to ask me some questions.

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The SPEAKER. The time of the gentleman has expired. All time has expired.

Mr. DOUGHTON. Mr. Speaker, I move the previous question on the adoption of the conference report.

The previous question was ordered.

The SPEAKER. The question is on agreeing to the conference report.

The question was taken; and on a division (demanded by Mr. PATMAN and Mr. MARCANTONIO) there were—ayes 125, noes 36.

Mr. PATMAN. Mr. Speaker, I object to the vote on the ground a quorum is not present.

Mr. MARCANTONIO. Mr. Speaker, I also object to the vote on the ground a quorum is not present.

The SPEAKER. Obviously a quorum is not present.

The Doorkeeper will close the doors, the Sergeant at Arms will notify the absent Members, and the Clerk will call the roll.

The question was taken; and there were—yeas 237, nays 102, not voting 88, as follows:

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So the conference report was agreed to.

The Clerk announced the following pairs:

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SENATE

Monday, February 7, 1944

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MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. McLeod, one of its clerks announced that the House had agreed to the reports of the committees of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the following bill and joint resolution of the House:

H. R. 3687. An act to provide revenue, and for other purposes; and

H. J. Res. 208. Joint resolution making an appropriation to assist in providing a supply and distribution of farm labor for the calendar year 1944.

THE REVENUE ACT—CONFERENCE REPORT

Mr. GEORGE. Mr President, I submit the conference report on House bill 3687, the Revenue Act of 1943, and move that the Senate proceed to its consideration.

The ACTING PRESIDENT pro tempore. The report will be read.
The report was read.

(For conference report on House bill 3687, the revenue act, see the proceedings of the House of Representatives of February 7, 1944, pp. 1314-1325.)

The ACTING PRESIDENT pro tempore. The question is on the motion of the Senator from Georgia that the Senate proceed to the consideration of the conference report.

The motion was agreed to, and the Senate proceeded to consider the report of the committee on conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. 3687) to provide revenue, and for other purposes.

Mr. GEORGE. Mr. President, after a conference lasting less than a week the managers on the part of the Senate and House came to full agreement on the revenue bill of 1943. Differences between the House and Senate bills, especially important with respect to renegotiation, were settled in a spirit of harmony and cooperation.

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The PRESIDING OFFICER (Mr. LA FOLLETTE in the chair).
The question is on agreeing to the conference report.
The report was agreed to.

65. A PRIVATE BILL

Below is a private bill. Much complaint has been made about the time taken by Congress from more important legislation for the passage of such private bills. For a recommendation that claims against the federal government be handled by the courts, see reading no. 66, *infra*, section V:2. The following is from the *Congressional Record*, Volume 91, Part 8, page 10381.

HOUSE OF REPRESENTATIVES

Monday, November 5, 1945

WILLIE HINES

The Clerk called the bill (H. R. 2544) for the relief of Willie Hines. There being no objection, the Clerk read the bill, as follows:

Be it enacted, etc., That the Secretary of the Treasury is authorized and directed to pay, out of any money in the Treasury not otherwise appropriated,

to Willie Hines, of Palatka, Putnam County, Fla., the sum of \$2,500 in full satisfaction of his claims against the United States for personal injuries, hospital and medical expenses, loss of earnings, and other expenses, sustained by Willie Hines when he was struck by a United States Navy International tractor numbered 62758 with trailer numbered 76967 on November 11, 1944, while driving his car on United States Highway No. 17, north of Bostwich, Putnam County, Fla., in an orderly and lawful manner: *Provided*, That no part of the amount appropriated in this act in excess of 10 percent thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000.

With the following committee amendments:

Page 1, line 6, strike out "\$2,500" and insert "\$1,514.48."
Line 7, strike out the word "his" and insert "all."

The committee amendments were agreed to.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

66. REORGANIZATION OF CONGRESS

The *Report of the Joint Committee on the Organization of Congress*, pursuant to House Concurrent Resolution 18, dated March 4, 1946, and known as Senate Report No. 1011 of the 79th Congress, 2d Session, much of which is included in the reading below, is of great interest to students of American government. For other portions of this significant report, see readings no. 53 and no. 61, *supra*, and no. 87, *infra*.

The Seventy-ninth Congress adopted many of the recommendations included in this report in the Act frequently referred to as "Public Law 601, 79th Congress." The Eightieth Congress organized with fifteen standing committees in the Senate and nineteen standing committees in the House. See *Congressional Record*, Vol. 93, pages 112, 325, and 393. For the extent to which the 1947 Congress put some of the recommendations into effect see "New Congress Accepts 'Streamlining' Task," *Congressional Digest*, June-July, 1947.

REORGANIZATION OF CONGRESS

INTRODUCTION

The Joint Committee on the Organization of Congress submits herewith its report of recommended changes in the two Houses of Congress.

This joint committee was directed:

To make a full and complete study of the organization and operation of the Congress of the United States—

and to—

recommend improvements in such organization and operation with a view toward strengthening the Congress, simplifying its operations, improving its relationships with other branches of the United States Government and enabling it better to meet its responsibilities under the Constitution.

Our committee was created in response to a widespread congressional and public belief that a grave constitutional crisis exists in which the fate of representative government itself is at stake. Public affairs are now handled by a host of administrative agencies headed by nonelected officials with only casual oversight by Congress. The course of events has created a breach between government and the people. Behind our inherited constitutional pattern a new political order has arisen which constitutes a basic change in the Federal design. Meanwhile, government by administration is the object of group pressures which weaken its protection of the public interest. Under these conditions, it was believed, the time is ripe for Congress to reconsider its role in the American scheme of government and to modernize its organization and procedures.

The committee held 39 public hearings and 4 executive sessions between March 13 and June 29, 1945. The testimony of 102 witnesses was taken, 45 of whom were Members of Congress. In addition, 37 Members and many interested private citizens submitted written statements. A review of all the testimony received reveals a wide area of agreement among the witnesses with respect both to the conditions that handicap Congress in the efficient performance of its proper functions and as to many appropriate remedies for these defects.

I. COMMITTEE STRUCTURE AND OPERATION

Your committee believes that no adequate improvement in the organization of Congress can be undertaken or effected unless Congress first reorganizes its present obsolete and overlapping committee structure. This is the first and most important test of whether Congress is willing to strengthen itself and its organization to carry the tremendous work load that present-day governmental problems place upon it.

About 90 percent of all the work of the Congress on legislative matters is carried on in these committees. Most bills recommended by congressional committees become laws of the land and the content of legislation finally passed is largely determined in the committees.

We feel that there is nothing sacrosanct in the present arrangement of our committees. A study of the committee system of both Houses reveals that since the First Congress the committees have undergone many realignments and changes as conditions demanded. As "the workshop of Congress" the committee structure, more than any other arm of the legislative branch, needs frequent modernization to bring its efficiency up to the requirements of the day.

However, because of obvious difficulties attendant upon the reduction of standing committees, Congress for many years past has neglected to survey its over-all needs for a more effective system. New committees have

been established to do particular jobs, but little attention has been paid to realinement of committees and their jurisdictions on an over-all basis.

Congress can no longer afford the luxury and waste of manpower and time in maintaining a total of 33 standing committees of the Senate and 48 standing committees of the House. We recognize the difficulties inherent in simplifying this old system of 81 standing committees. We realize that loyalties to these present committees, certain perquisites of membership upon them, established seniority rights, and a desire to maintain these traditional rights make reorganization of our committee structure the No. 1 problem to be faced in any attempt to modernize and strengthen the Congress.

Only by untangling the existing overlapping jurisdictional lines and merging standing committees which today have almost concurrent jurisdiction can present-day legislation be adequately handled. We have attempted in the following recommendation to merge closely related committees into one where their jurisdictions overlap or where they deal with similar subjects.

By limiting Members of Congress to service on a few committees, they can become more familiar with their committee work. By consolidating many minor committees, a system of major committees for both houses will be created and members will have time properly to weigh and consider legislative matters referred to these consolidated committees. Many Members of the Senate now serve on as many as 10, 9, 8, and 7 special and standing committees, while some House Members serve on as many as 6 or more. By reducing this scattered work load through reorganization, Members will be relieved of many unrelated lines of legislation on their present hodgepodge of committee assignments in exchange for positions on one or two committees of greater responsibility and related legislative subject matter.

1. Reorganization of Senate Committees

Recommendation: That the 33 standing committees of the Senate be reorganized into 16, substantially as proposed by Senator La Follette.

Your committee, after studying many proposals for committee consolidation, believes that the recommendation for consolidating the 33 standing Senate committees into 16, based on Senator La Follette's proposal, offers the best chance for improving the committee structure of the upper House.

Under this plan, each Senator would be limited to membership on two standing committees. By permitting concentration on two major committee activities, much of the present waste of time and scattered attention would be avoided. Each committee would have work of sufficient importance to justify specialization in its particular lines of activity. Each standing committee should have power to act jointly with the corresponding committee of the House of Representatives.

Therefore, your committee recommends consolidation of existing Senate standing committees as follows:

<i>Existing committees</i>	<i>Reorganized committees</i>
Agriculture and Forestry	Agriculture.
Appropriations	Appropriations.
Audit and Control	} Rules and Administration of the Senate.
Enrolled Bills	
Library	
Printing	
Privileges and Elections	
Rules	
Banking and Currency	Banking and Currency.
Finance	Finance.
Education and Labor	} Labor and Public Welfare.
Finance (social-security jurisdiction)	
Claims	Claims. ¹
Commerce	} Interior, Natural Resources, and Public Works.
Indian Affairs	
Interoceanic Canals	
Irrigation and Reclamation	
Mines and Mining	
Public Buildings and Grounds	
Public Lands and Surveys	
Territories and Insular Affairs	
Civil Service	} Civil Service.
Post Offices and Post Roads ²	
District of Columbia	District of Columbia. ¹
Expenditures in the Executive Departments ...	Expenditures in the Execu- tive Departments.
Military Affairs	} Armed Services.
Naval Affairs	
Pensions	} Veterans' Affairs.
Finance (veterans' jurisdiction)	
Foreign Relations	Foreign Relations.
Interstate Commerce	} Interstate Commerce.
Manufactures	
Patents	} Judiciary.
Judiciary	
Immigration	

2. Reorganization of House Committees

Recommendation: That the 48 standing committees of the House be reorganized into 18, substantially as proposed by Representative Wadsworth.³

After considering many committee consolidation proposals made for the House, your committee believes that the proposal made by Representa-

¹ These two committees to be abolished after District self-government and judicial or administrative settlement of claims, recommended below, have been approved and effected.

² The post roads phase of this committee's work to be absorbed by the new Committee on Interior, Natural Resources, and Public Works.

³ Mr. Cox regrets that he is unable to join in this recommendation.

tive Wadsworth offers, with one or two minor changes, the most practical and feasible arrangement. It would limit each of the Members of the House to one major committee assignment, and would regroup and redistribute the work-load so as to justify giving each reorganized committee the status of a major committee.

This regrouping would further permit an average membership of 23 on all major standing committees of the House, keeping the important Appropriations Committee at its present size of 43 members.

Your committee therefore recommends consolidating the existing committees of the House of Representatives as follows: ⁴

<i>Existing committees</i>	<i>Reorganized committees</i>
Agriculture	Agriculture.
Appropriations	Appropriations.
Expenditures in the Executive Departments ..	Expenditures in the Executive Departments.
Banking and Currency	} Banking and Currency.
Coinage, Weights, and Measures	
Civil Service	} Civil Service.
Census	
Post Office and Post Roads	
District of Columbia	
Flood Control	} Public Works:
Public Buildings and Grounds	
Rivers and Harbors	
Roads	
Interstate and Foreign Commerce	Interstate and Foreign Commerce.
Judiciary	} Judiciary.
Patents	
Revision of the Laws	
Immigration and Naturalization	
Foreign Affairs	Foreign Affairs.
Labor	} Labor.
Education	
Merchant Marine and Fisheries	Merchant Marine and Fisheries.
Military Affairs	} Armed Services.
Naval Affairs	
Pensions	} Veterans' Affairs.
Invalid Pensions	
World War Veterans' Legislation	
Public Lands	} Public Lands.
Territories	
Irrigation and Reclamation	
Mines and Mining	
Insular Affairs	
Indian Affairs	
Ways and Means	Ways and Means.
Rules	Rules.

⁴ This recommendation contemplates no change in the status of the present Joint Standing Committees on Internal Revenue Taxation, Printing, Library, and the Economic Report.

Accounts	}	House Administration.
Disposition of Executive Papers		
Enrolled Bills		
Library		
Memorials		
Printing	}	Would abolish these and transfer the jurisdiction of the Elections committees to the Committee on House Administration, and the functions of the Claims committees to the courts.
Election of President, Vice President, and Representatives in Congress.		
Elections No. 1		
Elections No. 2		
Elections No. 3		
Claims		
War Claims		
Un-American Activities	}	Un-American Activities.

3. Jurisdiction of Committees

Recommendation: That House and Senate rules be amended to define clearly the jurisdiction of each reorganized committee so as to avoid overlapping and duplication and conflicts of jurisdiction.

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4. Legislative Oversight by Standing Committees

Recommendation: That the standing committees of both Houses be directed and empowered to carry on continuing review and oversight of legislation and agencies within their jurisdiction; that the power of subpoena be given them; and that the practice of creating special investigating committees be abandoned.

One of the most difficult problems studied by your committee was that of improving the relationship between Congress and the executive departments of Government. This was ordered in the joint resolution under which we have been operating and appears to your committee to be one of the important phases of our study.

While the Constitution directed the separation of powers between the executive and legislative branches, it did not intend them to go separate ways and in opposite directions. Each year the gulf between Capitol Hill and the departments widens. And without effective legislative oversight of the activities of the vast executive branch, the line of democracy wears thin. Only 1 man out of the 3,000,000 Federal employees is elected by and is responsible directly to the people.

Composed of the directly elected representatives of the people, Congress needs to improve its lines of communication, its relationships, its understanding of the departments. At present there is no regular machinery of cooperation between them, aside from inadequate informal conversations or correspondence or a full-dress investigation, by which the common problems of governmental policy can be surveyed.

Vast powers are often necessarily delegated to governmental agencies. Sometimes the laws are not clear or specific and sometimes a problem

defies specific legal description and adequate limitation. A clear and continuing understanding of the objectives and methods of the departments should be achieved.

We feel that this oversight problem can be handled best by directing the regular standing committees of the Senate and House, which have such matters in their jurisdiction, to conduct a continuous review of the agencies administering laws originally reported by the committees. Frequent consultation with and reporting to the committees would greatly improve relationships between the executive and legislative branches.

Such review might well include a question period by the committee arranged with the help of a greatly improved committee staff. By this method an open channel of complaints of agency shortcomings or abuses of authority could be maintained so as to furnish all Members of Congress with a clearinghouse for bringing complaints to the attention of administrators through the proper legislative committees.

Directing the regular standing committees to carry on this supervisory function appeals to your committee as a better method than the appointment of numerous select investigating committees when situations have grown so difficult as to arouse public demand for correction or special study. We recommend that the practice of creating special committees of investigation be abandoned.

Each of the reorganized standing committees should be given the power of subpoena and should be authorized to undertake studies of matters within its jurisdiction either by full or subcommittee action. By directing its standing committees to perform this oversight function, Congress can help to overcome the unfortunate cleavage between the personnel of the legislative and the executive branches.

5. Committee Hearings and Records

Recommendation: That all committees set aside monthly docket days for the public hearing of Members who have bills pending before them; that committees set regular meeting days for the consideration of such business as the committee determines; that complete records of all committee proceedings (except executive sessions) be kept; that attendance records be kept; and that a record of the votes of all Members on bills and amendments when a record vote is demanded be printed in the Congressional Record.

Criticism of conditions that handicap the individual Member of Congress as well as committee members was voiced in our hearings. These include the frequent inability of a Member of Congress to obtain a hearing on legislation which he has introduced.

Hundreds of bills introduced by Members of Congress are never considered even for a brief period by the committees to which they are referred. In order to get a hearing by the committee having their legislation in charge, Members must informally solicit committeemen for the privilege of even a brief cursory appearance. This tends to bottle up legislation

originating in Congress itself, while the right-of-way is generally given to legislation originating in the executive departments.

To correct this sometimes arbitrary discrimination against the bills of Members of Congress and committeemen themselves, we propose that a regular period each month be set aside by the standing committees when Members who have introduced bills may appear and publicly explain them, outline their support, and ask the full committee to decide whether extended hearings shall be held.

In order further to facilitate self-rule by the committees, it is recommended that each standing committee fix regular weekly, biweekly, or monthly meeting days when the committee will be in session at stated hours for the transaction of any business that committee members themselves may determine. Extra meetings in addition to the regularly stated sessions would be called by the chairman.

All committees should be required to keep a complete record of all committee proceedings, except executive sessions. Such records would include the attendance of Members at committee sessions and the votes of all members of the committee on bills and amendments on which a record vote is demanded. Such record votes should be printed in the Congressional Record.

6. Reporting of Bills

Recommendation: That committee chairmen be required to report promptly all bills approved by the committee and seek a rule to bring them to the floor for consideration.

In order to insure the carrying out of the will of the standing committees having jurisdiction of legislation, some change in the rules governing the reorganized committees is necessary.

We consider that each committee is a creature of the Congress and will have coequal standing with the other committees under the recommended reorganization plan. Each chairman, even though he is the executive of the committee, should be bound by the decisions of its members as expressed in regular committee session. The withholding of legislation from the floor, through failure to report it to the Chamber or failure to obtain a rule making it in order for consideration by the Chamber, is not consistent with the authority and rights of the committee as expressed by its action and status.

We therefore recommend that, in the revision of the rules governing the reorganized committees, a chairman be required to report promptly to the Chamber any bill approved by his committee and to take such steps as will give the Chamber a chance to vote on it. But no committee should report out a bill unless a majority of the committee members actually are present and vote in favor of a report.

7. Limitation of Conference Reports

Recommendation: That conferees of the two Houses be limited to adjustment only of actual differences in fact between the two Houses and that matters on which both Houses are in agreement be not subject to change in conference.

Considerable testimony regarding the introduction by conferees of new material into conference reports, and the elimination or substantial change of legislation agreed to by both Houses, was presented during our committee's hearings. While the standing rules are clear regarding the limitation of conferees to the disagreements between the two Houses, parliamentary procedures make it possible for conferees completely to rewrite legislation substantially agreed upon in both Chambers.

This is done by one House striking everything after the enacting clause, substituting one over-all amendment, and thus technically placing everything in the bill in disagreement and therefore making it subject to complete revision by the conferees. This is clearly not the intent of the rule on conferences.

Therefore, your committee recommends that rules governing conferences be clarified and enforced so as to permit consideration only of sections or parts of a bill on which the Houses have, in fact, disagreed and to forbid conferees to change those parts of legislation agreed to by both Houses.

8. Digest of Bills in Reports

Recommendation: That a complete and understandable digest of a bill, together with legislative changes made by the bill, written in nontechnical language, accompany the committee report on each bill; and that this digest include a supporting statement of reasons for its passage, of the national interest involved, its cost, and the distribution of any benefits.

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9. Expert Staffs for Committees

Recommendation: (1) That each reorganized legislative committee be authorized to employ four staff experts in its particular province; that employment be limited to persons qualifying under prescribed standards; that staff employees be not dismissed for political reasons; that staff employees serve on committee work only; and that all committee records and files be separately maintained by staff employees. (2) That present clerical personnel of committees be retained up to six per committee to serve as clerks and stenographers for the committee staff, two each to be available for committee-connected work in the offices of the chairman and ranking minority member.

The lack of skilled staffs for the committee work-shops of Congress was more complained of than perhaps any other matter before your committee. Such complaints came not only from Congress itself, but also were mentioned by almost every student of governmental affairs who appeared.

The shocking lack of adequate congressional fact-finding services and skilled staffs sometimes reaches such ridiculous proportions as to make Congress dependent upon "hand-outs" from Government departments and private groups or newspaper stories for its basic fund of information on which to base legislative decisions. Many comparisons could be drawn to illustrate the sad state of committee staffing and the lack of attention hitherto paid by Congress to this very important facility.

Your committee feels that, by considerably increasing the number and greatly improving the technical competence of committee staffs, Congress can make a great contribution to sound legislative decisions on matters involving the security and future welfare of the Nation. Just as the committee system is the most important arm of the National Legislature, so the committee staff and its competence will substantially determine the strength of this arm.

Aside from the appropriation committees (which will be considered below), we feel that each of the reorganized committees should be given at least four highly skilled professional staff members in addition to their present clerical staffs.

The four professional staff members should be paid salaries ranging between \$6,000 and \$8,000 a year, large enough to command a high level of technical skill, and appointment to these positions should be so restricted that only persons with adequate experience and understanding of the committee's work can qualify.

We recommend that such personnel be eligible for appointment solely on merit and have qualifications to be determined by the director of congressional personnel (proposed later in this report). They should be appointed without regard to political affiliation and only persons whose qualifications are approved by the director of congressional personnel should be eligible for appointment by the committee. The staff members would be considered permanent employees of the Congress and should not be dismissed for political reasons.

Your committee realizes the difficulty in presenting a blueprint of the specific positions on each of the reorganized committees. Some committees will need two skilled attorneys and two economists; others will require a different division of skill and training. We feel that that is a matter of committee policy that must be made to fit the individual needs of the committees. The success of the addition of staff personnel will be determined by the planning of the job to be done by each staff member, and by the qualifications of the men chosen.

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No committee should be allowed to borrow personnel or experts from

executive agencies without the express permission of the Committee on Administration. We feel that the current custom of borrowing personnel is neither economically sound nor politically wise. Whatever staff Congress needs should be employed by Congress itself with qualifications meeting our specifications and they should work for Congress alone. We do not see the sense of appropriating money to Government agencies and asking them to hire the personnel we need.

Once the standing committees have been reorganized and expertly staffed, it will be possible to plan and conduct committee hearings more efficiently. At present hearings are often held with little advance preparation and are largely occupied by the reading of prepared statements by the witnesses. This procedure consumes precious committee time and leaves little for questions and answers. We suggest that the practice be adopted of requiring all witnesses before congressional committees to file statements of their testimony in advance and to limit their oral presentations to brief summaries of their main points. Part of the job of the expert committee staff would be to prepare digests of these statements in advance of the hearing and to brief the committeemen on the questions to be asked each witness. In this way the tedious oral repetition of written testimony could be avoided, much valuable time would be saved, and the conduct of committee hearings could be greatly expedited. Moreover, the record as presented to Congress, the press, and the public would be greatly improved.

10. Expansion of Legislative Counsel

Recommendation: That present appropriations to the Office of Legislative Counsel be expanded from \$90,000 per year to \$150,000 per year for the next 2 years; with further expansion later.

Testimony generally agreed that the work done by the Office of Legislative Counsel, within its present limitations, is very valuable and constructive. So successful has this work been in furnishing expert legal talent to the standing committees and to the conferees that many Members have asked for its expansion so as to make these bill-drafting services available to all the committees and Members of Congress. At present only 12 attorneys and law clerks compose the combined staff of the office at a total annual cost of \$90,000.

Much of the testimony heard by your committee dealt with the origins of legislation. It is well known that the formulation of legislation is no longer exclusively a congressional concern. For most bills introduced Members are merely conduits for the executive departments, private organizations, and individual constituents. More than half of the bills dropped into the "hopper" originate in the Federal departments and bureaus and are later revised in committee to accord with congressional views. Executive initiative in law making finds its fundamental warrant in the constitutional provision that the President—

shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient.

Although comparatively little legislation originates in Congress today, that body is still responsible for sifting, testing, and debating all legislative proposals wherever they come from and for determining the final shape of public policy. Congress must decide what bills are to be considered and approved and what the legislative policies of the Nation are to be. The executive branch formulates and executes. The legislature determines policy and evaluates its performance. We feel that Congress should play a larger part in preparing legislation and determining national policy, and that it should place less reliance on bills drafted by interested departments and other groups seeking legislation.

By the progressive expansion of the Office of Legislative Counsel this will become possible. Skilled bill draftsmen, understanding legislative methods and procedures, can add much to clarity of expression, standardization of form and style, and proper construction of proposed legislation. . . .

[FOR SECTION II OF SENATE REPORT NO. 1011, SEE READING NO. 53, *SUPRA*]

III. RESEARCH AND STAFF FACILITIES

The same lack of expert research help that exists among congressional committees (mentioned in sec. I) exists throughout the Congress. While committees must be strengthened by adequate staff help, research facilities for individual Members should also be improved. To strengthen the committees without giving Members access to staff aids would accomplish only half the job.

The problems of government and legislative policy making have become increasingly complex with the passing years. Before World War I a Member of Congress could equip himself fairly well through personal study to understand the facts of an issue. But today's problems are far too complex and too numerous to rely only on self-help. Facts, data, and statistics must be collected, briefed, and digested from many sources if the individual Member is properly to inform himself.

The Nation must not be left to rely on lawmakers whose only sources of information on which to base important decisions are the daily press, casual magazine articles, or hand-outs from business groups and governmental agencies. A pure and unbiased stream of information is necessary for the making of sound decisions.

Since 1919 Congress has been using the research facilities of the Legislative Reference Service. But that Service has long been hopelessly understaffed and underpaid. No director of any large national corporation would be satisfied with a research department costing only \$198,000 and

employing but 75 persons, only one-third of whom are at professional grades. Yet these are the present inadequate research resources of a Congress charged with legislating, inspecting, and providing for a public enterprise employing nearly 3,000,000 persons and costing in postwar years \$25,000,000,000 or more.

1. Enlargement of Legislative Reference Service

Recommendation: That the Legislative Reference Service in the Library of Congress be expanded by increasing its appropriation for the fiscal year 1947 to \$500,000, to \$650,000 for the fiscal year 1948, and thereafter to \$750,000 per year, in order to furnish skilled research assistance to Members of Congress, and to serve as a pool of experts to assist the committees of Congress.

We further recommend that two top-flight assistants from the Legislative Reference Service be assigned to the Press and Radio Galleries of the two Houses to assist representatives of the press and the radio in reporting the proceedings of Congress by making available relevant records, debates, and background data, and to summarize and digest public hearings before committees.

2. Relieving Members of Nonlegislative Work Load

Recommendation: That each senatorial and congressional office be authorized to employ a high-caliber administrative assistant at an annual salary of \$8,000 to assume nonlegislative duties now interfering with the proper study and consideration of national legislation.

Testimony introduced during our hearings estimated that as high as 80 percent of the average Member's time is spent in nonlegislative work. Expansion of governmental activities during the past 25 years has vastly increased the volume of correspondence and the requests for service from the Member's home State and district.

Many of these time-consuming details and errands must be serviced somewhere if the people are to continue to have a clearinghouse for their problems in the Nation's Capital. While it is true that the Constitution does not place this burden directly upon the Congress, nevertheless service to constituents has long been an accepted part of the job of a Member of Congress.

A small part of such service is useful in helping to untangle many problems that would otherwise receive cursory or scant attention. No other governmental agency could perform this function so cheaply or with the patience, understanding, and personal interest of congressional offices. It affords one of the few remaining direct contacts between the citizen and

his elected Representative. Constituent inquiries also serve to keep Members alert to problems arising under legislation passed by Congress or from the operation of administrative programs. Your committee has studied ways of divesting Members of some of this nonlegislative work load. We find it is neither possible nor advisable to eliminate this service now performed by congressional offices. But the rendering of this service requires increased help in Members' offices in order that they may have adequate time for their duties as national legislators.

At various times Congress has increased Members' stenographic and clerical help as the work load of services to constituents has increased. But we have done nothing to transfer from Members' shoulders the principal burden of this nonlegislative business. Through the appointment of a competent assistant capable of assuming a large part of this service burden, Members can be released for the performance of their legislative duties.

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3. Establishment of Congressional Personnel Office

Recommendation: That an Office of Congressional Personnel be established to provide Congress with a modern personnel system for all its service employees; to establish qualification standards, job classifications, tenure of employment, regular rules for promotion and pay increases, leave, retirement, etc. The Office of Congressional Personnel should be directed to eliminate duplicating and overlapping service and to regroup service offices and employment responsibility under one central division for each particular type of service; to appoint the housekeeping employees of Congress; and to notify the Secretary of the Senate, the Clerk of the House, and the disbursing officer of all such appointments.

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The first duty of the Director of the Office of Congressional Personnel would be to establish a modern personnel system for all employees of the House and Senate, covering qualification standards, job classifications, tenure of employment, regular rules for promotions and pay increases, leave, retirement, etc. He should be especially directed to study overlapping and duplicating services within the legislative establishment and to arrange for the establishment under unified management of a (1) central disbursing and auditing office (including provision for standardization of committee travel and per diem allowances); (2) central document room; (3) central mailing room; (4) central post office; and (5) central service management for all the Capitol buildings and grounds, including policing, janitors, and guides.

We further recommend that all service employees of the Capitol and the Congress be eligible for appointment only on a merit basis to be estab-

lished by the Director of Personnel and that the patronage system be abolished in these positions. While officers of the House and Senate would still be allowed discretion of selections, no one could be employed who was not certified as qualified by the Director of Personnel. The same condition would apply to the technical staffs recommended heretofore for the House and Senate committees.

4. Creation of a Stenographic Pool

Recommendation: That the Director of the Congressional Personnel Office recommended above be authorized to establish a stenographic pool upon which Senators and Representatives may draw during busy seasons when the clerical facilities of their offices are unable to keep abreast of the flow of mail.

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[FOR SECTION IV OF SENATE REPORT NO. 1011, SEE READING NO. 87, *INFRA*]

V. MORE EFFICIENT USE OF CONGRESSIONAL TIME

A vast amount of testimony revealed a high percentage of congressional time is devoted to matters of purely local or petty importance. More time is consumed in serving as the city council for the District of Columbia than is spent on matters involving great importance to the Nation. Private claims bills and inconsequential legislation dealing with local affairs and matters only slightly related to national policy take an excessive amount of congressional time from consideration of national affairs.

Your committee believes that Congress should jealously guard its time for ample debate and consideration of matters of national and international importance. It seems hardly consistent to hear the excuse that congressional calendars are too crowded to take up and discuss issues of great national interest when so much time is devoted to these minor matters.

Because of lack of congressional time, many matters of a policy nature are decided by executive departments and bureaus. The delegation of powers to make rules and regulations governing the operation of many programs is a common practice. Yet Congress still tenaciously clings to many insignificant details which could be far better handled by the executive departments and the courts.

Congress is drifting away from its traditional function as a truly representative assembly. Prolonged sessions resulting from improper organization of the work-load—and the consideration of many petty details—are keeping Members away from the people they represent for more than 10 to 11 months out of every year.

1. Self-Rule for District of Columbia

Recommendation: That Congress divest itself of the duty of governing the District of Columbia and provide for a referendum on adoption of self-government by city charter.⁶

The Nation cannot afford the luxury of having its national legislative body and the District committees in both the House and Senate perform the duties of a city council for the District of Columbia.

In order to relieve Congress of this extraneous work-load and enable it to devote full attention to national legislation, we recommend that a plan for self-rule for the District of Columbia be provided as early as possible.

We do not assume the responsibility of suggesting what plan should be adopted for handling the municipal affairs of the District, but we do recommend that steps be taken immediately to provide for establishing a commission of Washington residents to prepare a suitable city charter and that it be submitted by referendum to the citizens of the District for their approval or rejection.

We recommend that Congress authorize this referendum as soon as a satisfactory self-government city charter is drafted and that on its adoption legislation be introduced to make it effective.

2. Delegation of Private Claims

Recommendation: That Congress delegate authority to the Federal courts and to the Court of Claims to hear and settle claims against the Federal Government; and that Government agencies and departments be empowered to handle local and private matters now provided for in private bills, such as private pension bills and legislation authorizing construction of bridges over navigable streams.

Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well either for the Government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved.

Long delays in consideration of claims against the Government, time consumed by the Claims Committees of the House and Senate, and crowded private calendars combine to make this an inefficient method of procedure.

The United States courts are well able and equipped to hear these claims and to decide them with justice and equity both to the Government and to the claimants. We, therefore, recommend that all claims for damages against the Government be transferred by law to the United

⁶ Mr. Russell dissents from this recommendation.

States Court of Claims and to the United States district courts for proper adjudication.

We further recommend that private pension bills and other bills dealing with purely local and private matters, including the authority to construct bridges over navigable streams, be delegated to the proper agencies of government for final determination.

3. Limitations on Sessions of Congress

Recommendation: That Congress provide for a regular recess period at the close of each fiscal year to insure the return of Members to their constituencies at definite intervals each year.

Representative democracy cannot remain truly representative if elected Members are required to remain away from their constituencies for long periods of time. In recent years the sessions of Congress have been nearly continuous and both the Senators and Representatives and the people they represent have been denied the interchange of ideas so necessary to our system of government.

Proper functioning of the Congress as a representative body demands that the Members serve not as residents of Washington but as citizens of their respective States and districts, with intimate first-hand knowledge of the problems of the places they represent. Their return is not required for "fence building" or "vacations," but is in fact the essence of representative democracy.

We, therefore, recommend that Congress provide by law for a definite recess period to begin at the close of each fiscal year and that Congress reconvene on October 1 (or September 10). Such recess arrangements would, of course, be suspended in case of national emergency. Congress could be reconvened at any time upon the call of its leaders or the President could call a special session. With a regular recess date fixed, the program of Congress would be better organized and the consideration of legislation greatly expedited.

4. Experiment With Meeting Schedules

Recommendation: That Congress experiment with changing schedules for meetings so as to provide alternately three full days for committee meetings and three full days for Chamber sessions; and that Congress experiment with evening sessions.

Many suggestions were made by witnesses for changes in the legislative schedules of Congress. We feel that it is entirely proper for Congress to experiment with some of these suggested changes in order to determine whether a change of schedule might be beneficial.

We respectfully suggest experimentation by the leadership of the two Houses in dividing the workweek, reserving 3 days for morning and after-

noon hearings by committees, possibly with evening sessions on these days, and 3 days for sessions in the Chambers for legislative work. Sessions in the Chambers could be held either on three consecutive days or could alternate with days reserved for committee meetings.

We also recommend that the rules of the Senate be amended to provide that no committee shall sit during the sitting of the Senate, without special leave. The House of Representatives adopted such a rule in 1794.

[FOR SECTION VI OF SENATE REPORT NO. 1011, SEE READING NO. 61, *SUPRA*]

VII. CONGRESSIONAL PAY AND RETIREMENT

No study of the organization and operation of Congress would be complete without reference to the compensation of Members and provision for their retirement. While it is true that Congress occupies a unique place in American public affairs, it is not so unique that it can continue to attract able and qualified Members at a rate of compensation far below that prevailing in business or professional occupations requiring comparable ability and effort.

In fact, numerous instances have occurred in the past few months in which Congress was unable to hold several of its most valuable and experienced Members. These men left Congress to accept private employment, sacrificing years of experience and hard work in their governmental careers⁴; simply because they were unable to maintain a reasonable standard of living and to provide security for themselves and their families.

We do not say that the people cannot find, at present or even smaller salaries, 435 persons to serve in the House and 96 to serve in the Senate. We insist, however, that Congress cannot expect to attract to its service the ability and qualifications necessary to do the monumental job before it, at rates of pay far below the going rate in private employ for comparable ability and effort. We will continue, at an accelerating pace, to lose our ablest Members and at the same time we will fail to bring into congressional service young men of ability and energy, unless steps are promptly taken to increase their compensation and provide for their retirement.

Thus, in making recommendations to improve the operation and efficiency of Congress, we would be less than frank if we failed to recognize that, regardless of other procedural reforms which may be instituted, the final measure of effective representative democracy will be the quality of the membership of the Congress.

I. Increase in Annual Salaries for Members

Recommendation: That beginning with the Eightieth Congress the annual salary of Members of Congress be increased to \$15,000,⁷

⁷ Mr. Lane dissents from this recommendation.

and that all of the salary be taxed on the same basis and with the same allowable deductions as business and professional returns are taxed.

Numerous recommendations were made to your committee regarding an increase in congressional compensation. They included proposals by the National Planning Association and the American Political Science Association, which recommended \$25,000 and \$15,000 respectively, and various other groups which have made surveys of the organization and operation of Congress.

Unfortunately, the law places Congress in the undesirable role of passing upon its own salary scale. No other branch of government is in a like position. It is largely due to this unenviable responsibility that the matter of congressional salaries cannot be dispassionately discussed and resolved. But we feel that these difficulties, misunderstandings, recriminations, and their political repercussions can no longer be permitted to stand in the way of doing what is widely regarded as necessary in the matter of compensation.

We recommend, therefore, that the salaries of Members of Congress be increased to \$15,000 per year. We further recommend that this increase be not applicable until the Eightieth Congress is elected and sworn in on January 3, 1947. In the meantime, the full membership of the House must stand for reelection and one-third of the membership of the Senate must also be elected. Thus, despite the unenviable task of passing upon our own salaries, the people themselves will determine to a large degree the persons who will receive them.

It is contemplated that the effect of this salary increase will be to eliminate the necessity of any special expense account.

We further recommend that the full \$15,000 salary be taxable at regular rates, but that normal expense deductions, properly itemized, and allowable to business and professional men, be recognized. Specifically, this would include permission for a reasonable deduction for duplicated rents actually paid in the performance of congressional duties. Where Members are required to maintain two homes, one in their district and the other in Washington, occupancy costs for one should be deductible as a legitimate expense item.

2. Inclusion of Congress in Federal Retirement System

Recommendation: That Members of Congress be permitted to join the Federal retirement system on a contributory basis.

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3. Increase in Compensation of Officers of Congress

Recommendation: That beginning with the Eightieth Congress the annual salaries of the elected officers of the Senate and House

of Representatives be increased 50 percent over their present rates of compensation; that annual appropriations to the office of the Vice President, and the office of the Speaker be increased 50 percent over their present amounts; and that the Director of the Office of Congressional Personnel review the present salary scales paid employees in the offices of the Secretary of the Senate, the Clerk of the House, the Sergeants at Arms and the Doorkeepers and the Speaker's table and recommend equitable readjustments therein to the legislative subcommittees of the House and Senate Committees on Appropriations.

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VIII. OTHER RECOMMENDATIONS

We have not undertaken in this report to recommend all of the improvements and changes necessary to bring about the most desirable working facilities needed by Congress. Undoubtedly many needed reforms not mentioned herein will be proposed later.

We desire, however, to call attention to these concluding recommendations, which relate primarily to the physical conditions under which we work. We believe that improvement along these lines will not only aid the Congress materially, but will permit better public understanding of the operation of the representative branch of the Government.

1. Remodeling of House and Senate Chambers

Recommendation: That the Chambers of both Houses of Congress be remodeled to provide improved acoustics, better lighting, and adequate gallery facilities.

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2. Remodeling of Senate and House Caucus Rooms

Recommendation: That improved acoustic and seating facilities in the House and Senate caucus rooms be installed together with equipment for presentation of motion-picture or other visual displays for use in large-scale public hearings.

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3. Improvement of Restaurant Facilities

Recommendation: That the physical facilities in the Senate and House restaurants be so expanded and arranged as to reduce crowding and permit more Members and their constituents to dine there in greater comfort and convenience.

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4. Assignment of Capitol Space

Recommendation: That space in the Capitol Building be re-assigned so as to provide ample facilities for joint committees and conference committees of the two Houses.

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5. Facilities and Supervision of Pages

Recommendation: That improved school and housing facilities, as well as supervision, of Senate and House pages be provided.

If Congress is to retain the use of young boys in their traditional role as pages of the House and Senate, improved facilities must be provided. Our hearings developed much evidence that present scholastic facilities provided in the basement of the Capitol are not only unhealthful but extremely ill-adapted to use as classrooms. Further evidence was introduced showing the lack of proper housing and supervision of boys brought to Washington to enter the employ of the Congress.

Your committee recommends that Congress decide whether the use of young boys as pages is to be continued and, if so, that adequate school and housing facilities be provided for them so that their health, education, and morals can be safeguarded during their service here.

6. Improvement of Congressional Record

Recommendation: That the daily program of the Congress, including the legislative sessions, scheduled committee hearings, and location of these meetings be printed in the Congressional Record; and that brief résumé of the previous day's congressional activities be incorporated in the Record together with an index of its contents.

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7. Transfer of Inactive Records to National Archives

Recommendation: That the records of the House of Representatives from the First to the Seventy-sixth Congress, inclusive, be transferred to the Archives Building from the Capitol, the Old House Office Building, and the Library of Congress; that rule XXXII of the standing rules of the Senate be amended to provide for the transfer to the Secretary of the Senate at the close of each session of Congress of all the records of the standing and special committees of the Senate from whatever source received, including bills, resolutions, hearings, committee prints, reports, and other pertinent papers; and that the noncurrent records of joint committees of Congress be preserved and transferred to the National Archives.

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In addition to the matters discussed above, the joint committee heard testimony from Members of Congress and others in support of, and in opposition to, other changes in the organization and operation of Congress. The more noteworthy of these suggestions pertained to—

1. Selection of committee chairmen by some method other than seniority.
2. The powers of the Committee on Rules of the House of Representatives.
3. Experimentation with periods for questioning executive-department heads.
4. Limitation of debate in the Senate.

These proposals relate to problems that have long perplexed observers of the legislative process. In each case there is much to be said on both sides. The third and fourth topics listed above, however, deal with aspects of floor procedure upon which we are not at liberty to make any recommendations under the terms of House Concurrent Resolution 18.

On the seniority system and the powers of the House Rules Committee, we heard testimony and deliberated in executive session. But we are not now prepared to submit positive recommendations with regard to them because of a lack of agreement within the committee as to workable changes in existing practices.

Representations were also made to your committee in support of broadcasting the proceedings of the Houses and committees of Congress. We investigated the technical feasibility and cost of this proposal, but make no recommendation with regard to it, owing to differences of opinion within the committee as to its desirability.

Robert M. La Follette, Jr., *Chairman*.

A. S. Mike Monroney, *Vice Chairman*.

Elbert D. Thomas.

Claude Pepper.

Richard B. Russell.

Wallace H. White, Jr.

C. Wayland Brooks.

E. E. Cox.

Thomas J. Lane.

Earl C. Michener.

Everett M. Dirksen.

Charles A. Plumley.

67. LIMITATION OF DEBATE IN THE SENATE

(A) 1917, SENATOR HARDWICK

The following excerpts from the *Congressional Record*, Volume 55, Part 1, will contribute to an understanding of why some Senators

refuse to change their rules to further limit debate. Under the rules as amended in 1917, it is possible for filibusters to obstruct action in the Senate. Apparently some members of the Senate believe that the remedy would in the long run be productive of greater harm than that suffered from filibusters.

SENATE

Thursday, *March 8, 1917.*

The Chaplain, Rev. Forrest J. Prettyman, D. D., offered the following prayer:

Almighty God, the author of our liberty, defender of our rights, we turn our hearts to Thee this morning hour for that inward illumination by which alone we can know the things that make for our eternal peace. We thank Thee that Thou hast not permitted our spark of human knowledge to hide from us the vision of Thy glory and the reality of Thy thought and care and purpose for human life. We seek in Thy light to see light and turn our hearts to Thee that our path may be illumined by the Divine purpose and wisdom. So do Thou guide us this day in the discharge of our duties. For Christ's sake. Amen.

The Journal of yesterday's proceedings was read and approved.

LIMITATION OF DEBATE

Mr. MARTIN. Mr. President, I send to the desk a resolution and ask that it be read, and when it has been read I will ask for its immediate consideration.

The Secretary read the resolution, as follows:

Resolved, That the Senate shall, from and after its adoption, enforce the following rule, which is hereby adopted:

"If at any time a motion, signed by 16 Senators, to bring to a close the debate upon any pending measure is presented to the Senate, the Presiding Officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and upon the ascertainment that a quorum is present the Presiding Officer shall, without debate, submit to the Senate by an aye-and-nay vote the question:

"Is it the sense of the Senate that the debate shall be brought to a close?"

"And if that question shall be decided in the affirmative by a two-thirds vote of those voting, then said measure shall be the unfinished business to the exclusion of all other business until disposed of.

"Thereafter no Senator shall be entitled to speak in all more than one hour on the pending measure, the amendments thereto, and motions affecting the same, and it shall be the duty of the Presiding Officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be in order after the vote to bring the debate to a close, unless the same has been presented and read prior to that time. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the Presiding Officer, shall be decided without debate.

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Mr. CURTIS. Mr. President, I am very heartily in favor of this resolution which proposes to amend rules of the Senate so that debate may be closed. In 1911, when certain Senators on the other side were filibustering against certain measures which were then pending, I offered an amendment to the rules providing that two-thirds of the Senators might close debate after a certain time. That proposed amendment was not reported from the committee. In May, 1916, an amendment to the rules substantially like the one now proposed was reported unanimously from the Committee on Rules. That resolution, which enabled two-thirds of the Senate to close debate was on the calendar from May, 1916, to March 4, 1917, but was not taken up. The change proposed by the resolution was agreed to by a joint committee of the majority and the minority. I therefore hope this resolution may be adopted.

The VICE PRESIDENT. The question is on the adoption of the proposed rule.

Mr. SHERMAN. Mr. President, the immediate reason for the presentation of this resolution proposing to amend the rules is the failure to pass the armed merchant ship bill occurring when the Sixty-fourth Congress automatically adjourned last Sunday at noon. There was previous to the introduction of this measure a statement by the President which contains the following:

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It would not cure the difficulty to call the Sixty-fifth Congress in extraordinary session.

The paralysis of the Senate would remain. The purpose and the spirit of action are not lacking now.

The Congress is more definitely united in thought and purpose at this moment, I venture to say, than it has been within the memory of any man now in its membership. There is not only the most united patriotic purpose, but the objects members have in view are perfectly clear and definite.

But the Senate can not act unless its leaders can obtain unanimous consent. Its majority is powerless, helpless. In the midst of a crisis of extraordinary peril, when only definite and decided action can make the Nation safe or shield it from war itself by the aggression of others, action is impossible.

RULES SHOULD BE ALTERED.

Although, as a matter of fact, the Nation and the representatives of the Nation stand back of the Executive with unprecedented unanimity and spirit, the impression made abroad will, of course, be that it is not so, and that other governments may act as they please without fear that this Government can do anything at all. We can not explain. The explanation is incredible.

The Senate of the United States is the only legislative body in the world which can not act when its majority is ready for action.

A little group of willful men, representing no opinion but their own, have rendered the great Government of the United States helpless and contemptible.

The remedy? There is but one remedy. The only remedy is that the rules of the Senate shall be so altered that it can act. The country can be relied upon to draw the moral.

This is the placing of the responsibility for the failure of the bill in question on the Senate or on the small number of Senators who are alleged by their action to have prevented a roll call on the bill. I was for this bill, Mr. President. I would have voted for it if a roll call had been had in its extreme form as originally written. I will vote for it yet, if an extraordinary session of Congress be called, in the form in which it was originally written.

The President knows, this Senate knows, and the House knows what the general public does not know. The President intentionally seeks to convey to the country the impression that only a change of the rules in the event of a special session would make it possible for such legislation successfully to be considered at that special session. That is not practically true, however theoretically it may be sought to make it appear to be true.

There is in the memory of no person now having a seat in the Senate delayed action or a filibuster which destroyed meritorious legislation, save during the last few weeks of the short session, when Congress automatically adjourns on the succeeding 4th day of March of that year. That is known to this body. It is known to the President. It is not stated in this article or prepared statement which I have read, and which was given to the press and sown broadcast throughout the country. The entire truth ought to have been stated. The entire truth was not stated. A portion of the truth was deliberately omitted, I believe, from that statement to make a stronger case, and thereby arouse greater resentment against the few Senators who opposed bill in this body. It is not a fair statement.

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Mr. HARDWICK. . . .

This is a Government of checks and balances, and wisely so—so established, so constructed by our fathers; and, for one, I have not progressed far enough away from their ideas to believe that they wrought poorly, or that we can much improve on them, in the fundamentals, at least. I lay down the proposition before this Senate and before the country that to-day the last citadel of opposition to the Executive will and to the establishment of the Executive as an autocratic authority in this country, clothed with despotic powers, is here in this Chamber and on this floor; and I say to the Senate and to the country: If you chain this Senate, if you bind it, if you put it in the power of a partisan majority at any instant, at any moment, or on any question, to run roughshod over the minority for the time being, and deny to Senators the right to speak on this floor, and deny real debate in this Chamber, you will have destroyed one of the most valuable checks and balances in our Government, and you will have made a long step toward the possible establishment of an autocratic and despotic power in this country.

Mr. President, there is another reason why the Senate of the United States ought to be slow, indeed, about the adoption of any very radical or any very real cloture, and it is this: This is likewise the one piece of

governmental machinery in the American system where "Pause" can be said to the majority, where whatever party is in power can be halted temporarily at least, until in a way—unofficially, of course, and informally—the sense of the public may be taken on any pending question. If the proposition advocated by some Senators is adopted here, and cloture on the majority vote is established in this body, it may be easier for us, my colleagues, on this side, in disposing of party measures; it may be more convenient for us as individuals; it may seem temporarily that as Democrats we will gain some advantage, but I do believe that as Americans we will lose. We may not always be in power. In years past we have been in power but very little; and for years while I was a Member of another body at the other end of this building I saw Democratic minority Senators use these rules to assert the rights of the minority and to hold down a rampant majority in both Houses; and I tell you right now, it is one of the great barriers, one of the great checks, under our American system.

Why, majorities are not always right. No, Senators; not at all. We all know that. I have seen many instances in which minorities were right, and even the men who constituted the majority lived to admit it. Now, if that is true, we might just as well be a little careful about entirely stifling a minority, about denying it all voice, about denying it all opportunity to say "Halt" and "Pause" to a partisan majority.

Mr. President, so much for that. I am coming down now to this proposition. I support this resolution reluctantly—reluctantly for one reason alone. I can not help but feel reluctant to go even this far with you, Senators, when Senators are openly asserting that this is but the entering wedge; when Senators are telling me, even are saying in my presence, that this is merely the beginning of the end. I fear so, and yet I hope not. I hope that a careful consideration of this question will convince Senators who maintain even now that position that they ought not to insist upon it. I would not yield even this far except, Mr. President, that I do feel that on questions that affect our country's international affairs, when war is imminent, is threatened, or is actually occurring there must be some way in which the will of an overwhelming majority—a majority so large as to show that the interest of the country and not that of a party are at stake—can be asserted.

The Senator from Iowa said, and said very truly, that probably under this rule we might not have been able to pass the armed-neutrality bill. I think possibly we could have done it if the motion had been made when the matter was first presented. Certainly it could have been done if the proposition itself had been presented only a day or two earlier. Be that as it may, we, everyone, know that in the future on any question of this sort when two-thirds of the Senators, or a greater number even than two-thirds, stand together we will be able within a reasonable time to force a vote on any question in which the honor or the safety of the country is involved. For that reason, and for that reason alone, I am supporting this resolution.

Senators assert—some of them do on this side and a few on the other side—that they support this resolution reluctantly because it does not go far enough.

Mr. President, I support it reluctantly for a very different reason, for exactly the opposite reason, because I fear that it may go too far before many years be passed. My views on this question are so fixed and set that I thought it a matter of personal and official duty to utter my sentiments on this floor before the vote was taken.

Mr. President, I am about to yield the floor. I hope the resolution will pass. I intend to vote for it, and I am for it; but I hope the day may be far distant before any further step in this direction will ever be taken by this body.

The PRESIDENT pro tempore. Seventy-two Senators have answered to their names. There is a quorum present. The question is on the resolution offered by the Senator from Virginia [Mr. MARTIN].

The result was announced—yeas 76, nays 3, as follows:

(B) 1925, VICE PRESIDENT DAWES

The following excerpts from the *Congressional Record*, Volume 67, Part 1, suggest some of the reasons many people would like to see debate in the Senate limited further.

SENATE

Wednesday, *March 4, 1925*

CHARLES G. DAWES, of Illinois, Vice President of the United States, to whom the oath was administered at the close of the last regular session of the Sixty-eighth Congress, called the Senate to order at 12 o'clock meridian.

Rev. J. J. Muir, D. D., the Chaplain of the Senate, offered the following prayer:

ADDRESS OF THE VICE PRESIDENT

The VICE PRESIDENT. What I say upon entering this office should relate to its administration and the conditions under which it is administered. Unlike the vast majority of deliberative and legislative bodies, the Senate does not elect its Presiding Officer. He is designated for his duty by the Constitution of the United States.

In past years, because the Members of this body have cherished most commendable feelings of fairness, courtesy, and consideration for each

other as individuals, certain customs have been evolved. These have crystallized into fixed and written rules of procedure for the transaction of public business which, in their present form, place power in the hands of individuals to an extent, at times, subversive of the fundamental principles of free representative government. Whatever may be said about the misuse of this power under the present rules of the Senate, the fact remains that its existence, inimical as it is to the principles of our constitutional government, can not properly be charged against any party, nor against any individual or group of individuals. It has evolved as a natural consequence of the mutual confidence of high-minded men, determined that in their official association as Members of the Senate, full and fair opportunity to be heard on all public questions shall be enjoyed by each and every Senator, irrespective of whether or not they are in the minority, either of opinion or of party.

But however natural has been the evolution of the present rules, however commendable that existing desire on the part of all that the rights of each individual Senator should be observed, the fact remains that under them the rights of the Nation and of the American people have been overlooked—and this, notwithstanding that their full recognition of the rights of the Nation are in no wise inconsistent with the recognition of every essential right of any individual Senator.

What would be the attitude of the American People and of the individual Senators themselves toward a proposed system of rules if this was the first session of the Senate of the United States instead of the first session of the Senate in the Sixty-ninth Congress? What individual Senator would then have the audacity to propose the adoption of the present Rule XXII without modification when it would be pointed out that during the last days of a session the right that is granted every Senator to be heard for one hour after two-thirds of the Senate had agreed to bring a measure to a vote, gave a minority of even one Senator, at times, power to defeat the measure and render impotent the Senate itself? That rule, which at times enables Senators to consume in oratory those last precious minutes of a session needed for momentous decisions, places in the hands of one or of a minority of Senators a greater power than the veto power exercised under the Constitution by the President of the United States, which is limited in its effectiveness by the necessity of an affirmative two-thirds vote. Who would dare to contend that under the spirit of democratic government the power to kill legislation providing the revenues to pay the expenses of government should, during the last few days of a session, ever be in the hands of a minority or perhaps one Senator? Why should they ever be able to compel the President of the United States to call an extra session of Congress to keep in functioning activity the machinery of the Government itself? Who would dare oppose any changes in the rules necessary to insure that the business of the United States should always be conducted in the interests of the Nation and never be in danger of encountering a situation where one man or a minority of men might demand

unreasonable concessions under threat of blocking the business of the Government? Who would dare maintain that in the last analysis the right of the Senate itself to act should ever be subordinated to the right of one Senator to make a speech?

The rules can be found, as is the custom in other deliberative and legislative assemblies, to fully protect a Senator in his right to be heard without forfeiting at any time the greater right of the Senate to act. The Constitution of the United States gives the Senate and the House of Representatives the right to adopt their own rules for the conduct of business, but this does not excuse customs and rules which, under certain conditions, might put the power of the Senate itself in the hands of individuals to be used in legislative barter. Proper rules will protect the rights of minorities without surrendering the rights of a majority to legislate.

Under the inexorable laws of human nature and human reaction, this system of rules, if unchanged, can not but lessen the effectiveness, prestige, and dignity of the United States Senate. Were this the first session of the Senate and its present system of rules, unchanged, should be presented seriously for adoption, the impact of outraged public opinion, reflected in the attitude of the Senators themselves, would crush the proposal like an egg shell. Reform in the present rules of the Senate is demanded not only by American public opinion, but I venture to say in the individual consciences of a majority of the Members of the Senate itself.

As it is the duty on the part of the Presiding Officer of the Senate to call attention to defective methods in the conduct of business by the body over which he presides, so, under their constitutional power, it is the duty of the Members of this body to correct them. To evade or ignore an issue between right and wrong methods is in itself a wrong. To the performance of this duty, a duty which is nonpartisan, a duty which is non-sectional, a duty which is alone in the interest of the Nation we have sworn to faithfully serve, I ask the consideration of the Senate, appealing to the conscience and to the patriotism of the individual Members.

68. POWERS BASED ON CONSTITUTION

The following reading is from the classic opinion of Mr. Chief Justice John Marshall in the case of *M'Culloch v. The State of Maryland et al.*, 4 Wheat. 316 (1819). For other readings in this volume dealing with powers of Congress, see nos. 69, 72, 83, 86, 91, 92, 95, 96, 97, and 98, *infra*.

It is suggested that readers keep in mind specific restrictions on the powers of Congress expressed in Article I, Section 9, of the Constitution. An interesting discussion on bills of attainder will be found in *United States v. Lovett*, 328 U. S. 303 (1946), where the Supreme Court held that "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

For a lengthy consideration of "Congress shall make no law respecting an establishment of religion," in Amendment I, see *Eversson v. Board of Education*, decided by the Supreme Court of the United States on February 10, 1947.

The first question made in the cause is, has congress power to incorporate a bank?

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In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion. ✓

It would be difficult to sustain this proposition. The convention which framed the constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the State government. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But,

surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then, (whatever may be the influence of this fact on the case,) is, emphatically and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing in the constitution or laws of any State, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of

Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

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The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. . . . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted

in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

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But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which

import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word “necessary” is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying “imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,” with that which authorizes congress “to make all Laws which shall be necessary and proper for carrying into execution” the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word “necessary,” by prefixing the word “absolutely.” This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty, is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much

plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend, that the legislature might not superadd to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered “to provide for the punishment of counterfeiting the securities and current coin of the United States,” and “to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.” The several powers of congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power “to establish post-offices and post-roads.” This power is executed by the single act of making the establishment. But, from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offences is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word “necessary” must be abandoned in order to punish, whence is derived the rule which would reinstate it,

when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and proper to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:—

1. The clause is placed among the powers of congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned, for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the grant of power, than its limitation. If then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that

intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. . . .

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which

circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

69. UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER

Limits on the power of Congress, given effect through judicial decision, are indicated in the following reading from the opinion of Mr. Chief Justice Hughes in the case of *A. L. A. Schechter Poultry Corporation et al. v. United States*, 295 U. S. 495 (1935).

In *Yakus v. United States* and *Rottenberg et al. v. United States*, 321 U. S. 414 (1944), the court said that the Emergency Price Control Act of January 30, 1942, as amended by the Inflation Control Act of October 2, 1942, was not an unconstitutional delegation of the legislative power of Congress to the Price Administrator; for it "laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established."

Second. The question of the delegation of legislative power. We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Co. v. Ryan*, 293 U. S. 388. The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Art. I, § 1. And the Congress is authorized "To make all laws which shall be necessary and proper for carrying into execution" its general powers. Art. I, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. *Id.*, p. 421.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations,—whether Congress in authorizing “codes of fair competition” has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

The aspect in which the question is now presented is distinct from that which was before us in the case of the *Panama Company*. There, the subject of the statutory prohibition was defined. National Industrial Recovery Act, § 9 (c). That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the range of discretion given to the President in prohibiting that transportation. *Id.*, pp. 414, 415, 430. As to the “codes of fair competition,” under § 3 of the Act, the question is more fundamental. It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by “fair competition” as the term is used in the Act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction and expansion which are stated in the first section of Title I?

The Act does not define “fair competition.” “Unfair competition,” as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one’s goods as those of a rival trader. . . . But it is evident that in its widest range, “unfair competition,” as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The Government does not contend that the Act contemplates such a limitation. It would be opposed both to the declared purposes of the Act and to its administrative construction.

The question, then, turns upon the authority which § 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. See *Panama Refining Co. v. Ryan*, *supra*, and cases there reviewed.

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President’s discretion. *First*, the

President, as a condition of approval, is required to find that the trade or industrial associations or groups which propose a code, "impose no inequitable restrictions on admission to membership" and are "truly representative." That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. *Second*, the President is required to find that the code is not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." And, to this is added a proviso that the code "shall not permit monopolies or monopolistic practices." But these restrictions leave virtually untouched the field of policy envisaged by section one, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make—that the code "will tend to effectuate the policy of this title." While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the "Declaration of Policy."

Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as "in his discretion" he thinks necessary "to effectuate the policy" declared by the Act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The Act provides for the creation by the President of administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants,—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify or reject them as he pleases. Such recommendations or findings in no way limit the authority which § 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country.

Such a sweeping delegation of legislative power finds no support in the decisions upon which the Government especially relies. By the Interstate Commerce Act, Congress has itself provided a code of laws regulating the activities of the common carriers subject to the Act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the

Act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. . . . When the Commission is authorized to issue, for the construction, extension or abandonment of lines, a certificate of "public convenience and necessity," or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest," we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. . . .

Similarly, we have held that the Radio Act of 1927 established standards to govern radio communications and, in view of the limited number of available broadcasting frequencies, Congress authorized allocation and licenses. . . .

To summarize and conclude upon this point : Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

XII

The Federal Judiciary and Law



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ARTICLE I of the Constitution of 1789 deals primarily with Congress, the legislative branch; Article II, with the President, the executive branch; and Article III, with the Courts, the judicial branch of the government of the United States. Readings in this chapter will vary the constitutional sequence by next directing attention to the Courts. Recent growth of executive and administrative agencies makes it convenient to consider the work of the President just before taking up the problems of administration and the major activities of the central government.

It is important that citizens of the United States appreciate the true function of law in society. Some advocates of democracy seem to emphasize freedom *from* law rather than freedom *under* law. Some idealists seem to rely upon the use of law to create morality instead of depending upon the development of morality as a basis for law. Readings in this chapter may help stimulate the thinking of students as to just what the place of law in society is or should be.

THE FEDERAL JUDICIARY AND LAW



70. REORGANIZATION OF FEDERAL COURTS

Perhaps no other single political issue in the entire history of the United States provoked as much public discussion and as bitter debate as did the proposal of President Franklin D. Roosevelt in 1937 that additional judges be named to serve on the bench of the Supreme Court. The message of the President dealing with that proposal, given in the reading below, is taken from the *Congressional Record*, Volume 81, Part 1.

Merlo J. Pusey in *The Supreme Court Crisis* thinks the 1937 judiciary bill "will doubtless be recorded in history as the most serious mistake of President Roosevelt's brilliant political career." It is interesting to note that Roosevelt (see the reading below) reminded Congress that in 1869, when Republicans were in power: "It was then proposed that when a judge refused to retire upon reaching the age of 70, an additional judge should be appointed to assist in the work of the court. The proposal passed the House but was eliminated in the Senate." For numerous "comments pro and con" on this 1937 court proposal, see William R. Barnes and A. W. Littlefield, *The Supreme Court Issue and the Constitution*.

Roosevelt's proposal as to the Supreme Court was defeated; but, says Robert K. Carr, writing in 1942 in *The Supreme Court and Judicial Review*, "that the Court was not unimpressed by what had occurred is suggested by the fact that no federal law has since been invalidated." Many people felt that the President "had lost the battle but won the war." Not very long after 1937, Roosevelt appointees constituted a majority of the active judges on the Supreme Court bench. See reading no. 71, *infra*.

The Roosevelt proposals of 1937 were not without some effect on legislation.

SENATE

Friday, February 5, 1937

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REORGANIZATION OF JUDICIAL BRANCH OF THE GOVERNMENT

(H. DOC. NO. 142)

The VICE PRESIDENT laid before the Senate a message from the President of the United States, which was read, and, with the accompanying papers, ordered to be printed in the RECORD, as follows:

To the Congress of the United States:

I have recently called the attention of the Congress to the clear need for a comprehensive program to reorganize the administrative machinery of the executive branch of our Government. I now make a similar recommendation to the Congress in regard to the judicial branch of the Government, in order that it also may function in accord with modern necessities.

The Constitution provides that the President "shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." No one else is given a similar mandate. It is therefore the duty of the President to advise the Congress in regard to the judiciary whenever he deems such information or recommendation necessary.

I address you for the further reason that the Constitution vests in the Congress direct responsibility in the creation of courts and judicial offices and in the formulation of rules of practice and procedure. It is, therefore, one of the definite duties of the Congress constantly to maintain the effective functioning of the Federal judiciary.

The judiciary has often found itself handicapped by insufficient personnel with which to meet a growing and more complex business. It is true that the physical facilities of conducting the business of the courts have been greatly improved, in recent years, through the erection of suitable quarters, the provision of adequate libraries, and the addition of subordinate court officers. But in many ways these are merely the trappings of judicial office. They play a minor part in the processes of justice.

Since the earliest days of the Republic, the problem of the personnel of the courts has needed the attention of the Congress. For example, from the beginning, over repeated protests to President Washington, the Justices of the Supreme Court were required to "ride circuit" and, as circuit justices, to hold trials throughout the length and breadth of the land—a practice which endured over a century.

In almost every decade since 1789, changes have been made by the Congress whereby the numbers of judges and the duties of judges in Federal courts have been altered in one way or another. The Supreme Court was established with 6 members in 1789; it was reduced to 5 in 1801; it was increased to 7 in 1807; it was increased to 9 in 1837; it was increased to 10 in 1863; it was reduced to 7 in 1866; it was increased to 9 in 1869.

The simple fact is that today a new need for legislative action arises

because the personnel of the Federal judiciary is insufficient to meet the business before them. A growing body of our citizens complain of the complexities, the delays, and the expense of litigation in United States courts.

A letter from the Attorney General, which I submit herewith, justifies by reasoning and statistics the common impression created by our overcrowded Federal dockets—and it proves the need for additional judges.

Delay in any court results in injustice.

It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.

Delays in the determination of appeals have the same effect. Moreover, if trials of original actions are expedited and existing accumulations of cases are reduced, the volume of work imposed on the circuit court of appeals will further increase.

The attainment of speedier justice in the courts below will enlarge the task of the Supreme Court itself. And still more work would be added by the recommendation which I make later in this message for the quicker determination of constitutional questions by the highest court.

Even at the present time the Supreme Court is laboring under a heavy burden. Its difficulties in this respect were superficially lightened some years ago by authorizing the Court, in its discretion, to refuse to hear appeals in many classes of cases. This discretion was so freely exercised that in the last fiscal year, although 867 petitions for review were presented to the Supreme Court, it declined to hear 717 cases. If petitions in behalf of the Government are excluded, it appears that the Court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications. Many of the refusals were doubtless warranted. But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants?

It seems clear, therefore, that the necessity of relieving present congestion extends to the enlargement of the capacity of all the Federal courts.

A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves. This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion.

In the Federal courts there are in all 237 life-tenure permanent judgeships. Twenty-five of them are now held by judges over 70 years of age and eligible to leave the bench on full pay. Originally no pension or retirement allowance was provided by the Congress. When, after 80 years

of our national history, the Congress made provision for pensions, it found a well-entrenched tradition among judges to cling to their posts, in many instances far beyond their years of physical or mental capacity. Their salaries were small. As with other men, responsibilities and obligations accumulated. No alternative had been open to them except to attempt to perform the duties of their offices to the very edge of the grave.

In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities. "They seem to be tenacious of the appearance of adequacy." The voluntary retirement law of 1869 provided, therefore, only a partial solution. That law, still in force, has not proved effective in inducing aged judges to retire on a pension.

This result had been foreseen in the debates when the measure was being considered. It was then proposed that when a judge refused to retire upon reaching the age of 70, an additional judge should be appointed to assist in the work of the court. The proposal passed the House but was eliminated in the Senate.

With the opening of the twentieth century, and the great increase of population and commerce, and the growth of a more complex type of litigation, similar proposals were introduced in the Congress. To meet the situation, in 1913, 1914, 1915, and 1916, the Attorneys General then in office recommended to the Congress that when a district or a circuit judge failed to retire at the age of 70, an additional judge be appointed in order that the affairs of the court might be promptly and adequately discharged.

In 1919 a law was finally passed providing that the President "may" appoint additional district and circuit judges, but only upon a finding that the incumbent judge over 70 "is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character." The discretionary and indefinite nature of this legislation has rendered it ineffective. No President should be asked to determine the ability or disability of any particular judge.

The duty of a judge involves more than presiding or listening to testimony or arguments. It is well to remember that the mass of details involved in the average of law cases today is vastly greater and more complicated than even 20 years ago. Records and briefs must be read; statutes, decisions, and extensive material of a technical, scientific, statistical, and economic nature must be searched and studied; opinions must be formulated and written. The modern tasks of judges call for the use of full energies.

Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene

is the same as it was in the past, cease to explore or inquire into the present or the future.

We have recognized this truth in the civil service of the Nation and of many States by compelling retirement on pay at the age of 70. We have recognized it in the Army and Navy by retiring officers at the age of 64. A number of States have recognized it by providing in their constitutions for compulsory retirement of aged judges.

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.

It is obvious, therefore, from both reason and experience, that some provision must be adopted which will operate automatically to supplement the work of older judges and accelerate the work of the court.

I therefore earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of additional judges in all Federal courts, without exception, where there are incumbent judges of retirement age who do not choose to retire or to resign. If an elder judge is not in fact incapacitated, only good can come from the presence of an additional judge in the crowded state of the dockets; if the capacity of an elder judge is in fact impaired, the appointment of an additional judge is indispensable. This seems to be a truth which cannot be contradicted.

I also recommend that the Congress provide machinery for taking care of sudden or long-standing congestion in the lower courts. The Supreme Court should be given power to appoint an administrative assistant who may be called a proctor. He would be charged with the duty of watching the calendars and the business of all the courts in the Federal system. The Chief Justice thereupon should be authorized to make a temporary assignment of any circuit or district judge hereafter appointed in order that he may serve as long as needed in any circuit or district where the courts are in arrears.

I attach a carefully considered draft of a proposed bill which, if enacted, would, I am confident, afford substantial relief. The proposed measure also contains a limit on the total number of judges who might thus be appointed, and also a limit on the potential size of any one of our Federal courts.

These proposals do not raise any issue of constitutional law. They do not suggest any form of compulsory retirement for incumbent judges. Indeed, those who have reached the retirement age but desire to continue their judicial work would be able to do so under less physical and mental strain and would be able to play a useful part in relieving the growing congestion in the business of our courts. Among them are men of eminence and great ability, whose services the Government would be loath to lose.

If, on the other hand, any judge eligible for retirement should feel that his court would suffer because of an increase in its membership, he may retire or resign under already existing provisions of law if he wishes so to do. In this connection let me say that the pending proposal to extend to the Justices of the Supreme Court the same retirement privileges now available to other Federal judges has my entire approval.

One further matter requires immediate attention. We have witnessed the spectacle of conflicting decisions in both trial and appellate courts on the constitutionality of every form of important legislation. Such a welter of uncomposed differences of judicial opinion has brought the law, the courts, and, indeed, the entire administration of justice dangerously near to disrepute.

A Federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens may be denied to others. As a practical matter this means that for periods running as long as 1 year or 2 years or 3 years—until final determination can be made by the Supreme Court—the law loses its most indispensable element—equality.

Moreover, during the long processes of preliminary motions, original trials, petitions for rehearings, appeals, reversals on technical grounds requiring retrials, motions before the Supreme Court and the final hearing by the highest tribunal—during all this time labor, industry, agriculture, commerce, and the Government itself go through an unconscionable period of uncertainty and embarrassment. And it is well to remember that during these long processes the normal operations of society and government are handicapped in many cases by differing and divided opinions in the lower courts and by the lack of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice—certainty.

Finally, we find the processes of government itself brought to a complete stop from time to time by injunctions issued almost automatically, sometimes even without notice to the Government, and not infrequently in clear violation of the principle of equity that injunctions should be granted only in those rare cases of manifest illegality and irreparable damage against which the ordinary course of the law offers no protection. Statutes which the Congress enacts are set aside or suspended for long periods of time, even in cases to which the Government is not a party.

In the uncertain state of the law it is not difficult for the ingenious to devise novel reasons for attacking the validity of new legislation or its application. While these questions are laboriously brought to issue and debated through a series of courts, the Government must stand aside. It matters not that the Congress has enacted the law, that the Executive has signed it, and that the administrative machinery is waiting to function. Government by injunction lays a heavy hand upon normal processes; and

no important statute can take effect—against any individual or organization with the means to employ lawyers and engage in wide-flung litigation—until it has passed through the whole hierarchy of the courts. Thus the judiciary, by postponing the effective date of acts of the Congress, is assuming an additional function and is coming more and more to constitute a scattered, loosely organized, and slowly operating third house of the National Legislature.

This state of affairs has come upon the Nation gradually over a period of decades. In my annual message to this Congress I expressed some views and some hopes.

Now, as an immediate step, I recommend that the Congress provide that no decision, injunction, judgment, or decree on any constitutional question be promulgated by any Federal court without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard. This is to prevent court action on the constitutionality of acts of the Congress in suits between private individuals, where the Government is not a party to the suit, without giving opportunity to the Government of the United States to defend the law of the land.

I also earnestly recommend that in cases in which any court of first instance determines a question of constitutionality the Congress provide that there shall be a direct and immediate appeal to the Supreme Court, and that such cases take precedence over all other matters pending in that Court. Such legislation will, I am convinced, go far to alleviate the inequality, uncertainty, and delay in the disposition of vital questions of constitutionality arising under our fundamental law.

My desire is to strengthen the administration of justice and to make it a more effective servant of public need. In the American ideal of government the courts find an essential and constitutional place. In striving to fulfill that ideal, not only the judges but the Congress and the Executive as well must do all in their power to bring the judicial organization and personnel to the high standards of usefulness which sound and efficient government and modern conditions require.

This message has dealt with four present needs:

First, to eliminate congestion of calendars and to make the judiciary as a whole less static by the constant and systematic addition of new blood to its personnel; second, to make the judiciary more elastic by providing for temporary transfers of circuit and district judges to those places where Federal courts are most in arrears; third, to furnish the Supreme Court practical assistance in supervising the conduct of business in the lower courts; fourth, to eliminate inequality, uncertainty, and delay now existing in the determination of constitutional questions involving Federal statutes.

If we increase the personnel of the Federal courts, so that cases may be promptly decided in the first instance, and may be given adequate and prompt hearing on all appeals; if we invigorate all the courts by the

persistent infusion of new blood; if we grant to the Supreme Court further power and responsibility in maintaining the efficiency of the entire Federal judiciary; and if we assure Government participation in the speedier consideration and final determination of all constitutional questions, we shall go a long way toward our high objectives. If these measures achieve their aim, we may be relieved of the necessity of considering any fundamental changes in the powers of the courts or the Constitution of our Government—changes which involve consequences so far reaching as to cause uncertainty as to the wisdom of such course.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE, *February 5, 1937.*

71. THE HUMAN EQUATION IN SUPREME COURT DECISIONS

That personalities as well as constitutional principles must be considered in reading the opinions of judges, even those sitting on the bench of the Supreme Court of the United States, is seen in the following reading¹ which, it will be noted, was written before Vinson succeeded Stone as Chief Justice.

John Rensselaer Chamberlain, the author (b. 1903), is an outstanding writer and reporter. He has served as reporter for the *New York Times* (1926–1928) and daily book columnist (1933–1936), editor of *Fortune* magazine (1936–1941), Associate Professor at Columbia School of Journalism (1941–1944), and is now a contributor to leading magazines. His writings include: *Farewell to Reform*, *The American Stakes*, *Challenge to the New Deal*, *After the Genteel Tradition*, and *Books That Changed Our Minds*.

THE NINE YOUNG MEN

by John Chamberlain

President Roosevelt's "liberal" Supreme Court has fractured into a left, a center and a right. Result: for the first time in the court's history its justices disagree more times than they agree.

One of the more sobersided members of the U. S. Supreme Court was talking about the Cramer case, which is the first actual test of treason ever to reach the court for decision in 150 years of our existence as a republic. "This case," said the justice, "will make history. It will establish precedent for generations to come." Then, with a wink in his eye and a quirk at the corner of his mouth, the justice added, "At least it will establish precedent until it is reversed."

The justice's playful anticlimax was not so much a throwoff on his eight black-robed brethren as it was an ironic concession to a view that had been artfully propagated throughout the fall election campaign by Republican orators, including Vice Presidential Candidate John W. Bricker. "Clearly," said Mr. Bricker, "Mr. Roosevelt has successfully

¹ From "The Nine Young Men" by John Chamberlain, *Life*, January 22, 1945; courtesy of *Life* magazine.

'packed' our Federal judiciary from top to bottom . . . the 22,000,000 men and women who voted Republican in 1940 have been disfranchised judicially. . . . Even members of the Roosevelt High Court have admitted officially that the lower courts and the bar can no longer even guess with any degree of accuracy at what the law will be tomorrow." And Mr. Bricker went on to say that Justice Bill Douglas had likened the average new Supreme Court decision to a "restricted railroad ticket, good for this day and train only."

Aside from the fact that it was Justice Owen Roberts and not Bill Douglas who had used the "restricted ticket" phrase, what truth is there to the Bricker indictment? Is the Supreme Court in any valid sense a "packed" tribunal? And if the answer to that question is "yes," then how come the unpredictability? After all, the object of packing a court is to get an ascertainable result.

The truth is that if Roosevelt had had any intention to pack the court in a low partisan sense after losing the great "pack" fight of 1937 he has done an extremely bad job of it. The very fact of the dissensions that have had the justices publicly lecturing each other is proof that it is in the nature of courts to divide. Whether the bickering and the floundering of certain of the justices is a serious matter is something else again. During the 1943-44 term the justices disagreed more often than they agreed for the first time in the court's history; in only 42% of the opinions was there concurrence by all the participating individuals. Friends of the justices attribute the "coming of the new dissent" to the fact that it is a new court, full of exuberant, truth-seeking vitality and not yet shaken down into the predictable philosophical ruts of old age. Others, including many practicing members of the bar, think the dissents are too frivolously undertaken, with the kazoo or piccolo note often substituted for the old organ tones of Holmes, Brandeis and Cardozo.

Simply because the new court is unpredictable, lawyers feel like advising their clients to push cases as men bet on horse races, just for the sake of the gamble. Only a foolhardy man would wager any great sum that he could forecast the vote of the court on any big, undecided issue on the current docket, such as the immunity of a policeman who has killed a man through a possible excess of brutality during the pursuit of his calling, or the right of the Associated Press to limit its membership. And prophets who tried to guess just how the justices would vote on recent cases involving the legal rights of American citizens of Japanese ancestry were badly fooled.

If one wishes dramatic indication of the court's changefulness, the history of the Jehovah's Witnesses flag-salute cases offers the most startling evidence. Back in 1935 two schoolchildren in Minersville, Pa. refused to salute the flag in accordance with the rules laid down by a patriotic school board. The children were Lillian Gobitis, aged 12, and her brother William, aged 10. Their father, a member of the stiff-necked Jehovah's Witnesses religious sect, considered obeisance to a flag to be a direct violation of the

old Biblical injunction, "Thou shalt have no other gods before me." When the two children were expelled from public school in Minersville for disobeying the school board, the father brought suit. Eventually the case reached the Supreme Court, with the Gobitis lawyers claiming that Lillian and William had been denied their rights under the Fourteenth Amendment, which says that no state may deprive an individual of liberty (in this case the liberty of religion guaranteed by the First Amendment) without due process of law.

It was June of 1940 when the justices came to hand down their decision. By that time the German panzers were mopping up in France, which advertised to the world the vulnerability of a great democracy that had lacked any unifying concept of the commonweal. In deference, perhaps, to the social atmosphere of the time, eight of the nine justices upheld the coercive power of the Minersville school authorities. The majority opinion was delivered by Felix Frankfurter. Alone among the justices in his refusal to believe that patriotic unity can be compelled by forcing a religious minority to violate its conscience, Chief Justice Stone voiced a powerful dissent.

The eight-to-one vote must have seemed almost irrevocable to Stone as he tartly lectured his brethren for their fainthearted mistrust of freedom. But two years later Justices Black, Douglas and Murphy publicly confessed that they had been in error and at the end of the 1942-43 term of court, with two new justices sitting on the bench, the Gobitis decision was reversed by a six-to-three majority.

After such an overturn it might be presumed that the court had at last found its bent on basic civil liberty. But this month the lines became scrambled again. Justices who had voted one way on the civil rights involved in removing the California Japanese-Americans from their homes after Pearl Harbor voted another way on the rights of labor organizers to speak without a registration permit in the state of Texas.

True, the new court has certain underlying patterns of constancy in spite of such tergiversations; what seems like surface confusion often means that it merely splits different ways on different types of law. On extremely broad issues it is as predictable as any court of the past. Justice Black may accuse the ebullient, scholarly Frankfurter of basing his interpretation of statutes on a private conception of "morals" and "ethics," and Justice Roberts may come obliquely to the defense of his beleaguered brother. But the new court would not conceivably return to the doctrine of the old "Four Horsemen of reaction"—Van Devanter, Sutherland, Butler and McReynolds—on such things as child labor, or the use of the "due process" clause of the Fourteenth Amendment, or other "open-ended" constitutional verbalisms to outlaw legislation on economic matters affecting interstate commerce or the "general welfare." On broad constitutional issues the new court is inclined to give Congress its head. As a matter of fact, only once has the court thrown down an act of Congress since 1937, and that was on a minor issue of gun toting by a civilian who claimed as a

defense that it was not proven that his unregistered weapon had come to him through interstate commerce. The court would not allow a Congressional act to convict a man on mere "presumption of guilt."

When it comes to applying the fashionable terminology of "liberal" and "reactionary" to the present court the analyst at once gets into a semantic bog. Time was when "liberal" connoted an absence of state compulsion in the economic sphere as well as in civil rights. But after the great judicial dissenters of the past generation, Holmes, Brandeis and Cardozo, had made "liberalism" synonymous with an increase in the power of government to intervene in economic matters, the word lost precision. Today a "liberal" is, in popular usage, a man who sticks to his belief in civil liberties but who nonetheless believes in more and more state control over business. Even such transmogrification of basic English, however, does not serve to define the precise nature of the present court's New Dealism. There is a "left," "right" and "center" in judicial New Dealism, just as there have been four or five New Deals as Roosevelt has taken his seesaw course from NRA to trust-busting and from trust-busting to a wartime amity with big industrialists. Nor are Black, Reed, Frankfurter, Douglas, Murphy, Jackson and Rutledge, the seven Rooseveltian appointees on the court, necessarily the most Holmesian or "liberal" justices on all occasions. Stone was a Coolidge appointee and Roberts dates from Hoover's time, which makes them mossbacks in the eyes of the young. But Stone's Gobitis stand was both liberal and heroic, while Roberts can be a better civil libertarian than Hugo Black if the case at issue doesn't offend his legal sense. For that matter, Roberts may some day loom in history as the greatest liberal on the bench if the federal regulation which he sometimes opposes as a minority of one should insensibly pave the way for the final "total" regulation of a "corporative" or fascist state. "Liberal," some day, may come to mean what it meant originally.

C. Herman Pritchett, a Chicago professor whose annual hobby is to tot up the number of dissenting opinions, has remarked that, where the members of the old Hughes court differed as philosophers, the members of the new Rooseveltian court differ as lawyers. But it is not wholly true that the "new dissent" is a mere quarrel over technicalities within the church of New Dealism. The court does indeed make an honest attempt to limit its judgment to technical issues. For example, Jimmy Byrnes, during his short sojourn on the bench, went against all his philosophical predilections when he ruled in effect that Congress had not intended to strike at labor unions in its antiracketeering legislation. But personal philosophy inevitably colors opinions, even as in the days of Charles Evans Hughes or William Howard Taft: The U. S. Constitution is flexible and purposefully vague in certain of its key phrases. The power to tax for the "general welfare" and to "regulate commerce among the several states" can be stretched or confined according to judicial definitions of what constitutes deprivation of liberty or property or the right to "due process." Moreover, it takes nimble judicial crossbreeding of the First

and Fourteenth Amendments to enable a justice to guarantee freedom of religion, the press and the right of petition and assembly to individuals against county authorities, city governments and the 48 states. Where such "convenient vagueness" abounds, the human equation is bound to affect the result.

Life with the Justices

And so the pattern of contemporary judicial decision is woven, as always, by the interplay of the warp of constitutional language and the woof of personality. The threads of the woof may have a predominantly Rooseveltian dye, but the cloth they weave is nonetheless full of subtle blends, variegated harmonies and clashing discords.

The nine justices, whose intellectual squabbles are sometimes quite as heatedly personal as Washington's gossipmongers would make them out to be, hold their conclaves in a great Corinthian temple to the east of the Capitol. By custom each day there is a round robin of mutual handshaking, just to prove that the hard language of the day before has been forgotten. Theirs is a dedicated, monastic life even in vacation time, for during four months of the summer the justices hie themselves to various country retreats to plow through some of the thousand or more appeals and writs of certiorari (or applications for jurisdiction) which come to them each year and from which they select some 225 for hearing during the next court term. When the leaves begin to fall and Washington begins to come out from behind its air-conditioning machines, the justices return to their stately building, feeling, if they are humble, like the "nine black beetles in the Temple of Karnak" that Chief Justice Stone has quipped about.

The court routine is settled: mornings of study, a 12 to 2 session on the bench in a room of pinkish-marbled visual magnificence but atrocious acoustics, a half hour for lunch from the court's own excellent kitchen, two more hours of listening to the drone—or the occasional pyrotechnics—of lawyers, and then more study or a spot of tea with visitors. After two weeks of such routine the court knocks off to write opinions. Monday is decision day—a dramatic day in Washington now that law involving the relation of the individual or the state to an ever-growing federal government is the subject of most of the important cases.

On Saturdays the justices meet to discuss the court's grist, each judge carrying with him a little book of red, gold-tooled leather that comes fitted out with a protective lock and key. The books contain records of the cases, with places to record the individual votes of the justices. In the old days, when "Old Fox" Hughes handled the court in the manner of a Jehovah who had taken lessons from a drill sergeant, the Saturday sessions ended promptly at 4:30. But Chief Justice Stone is a New England town-meeting democrat; he allows full discussion carrying on to Saturday night and the judges usually talk themselves over into a session on Monday morning.

When the justices vote on a case, the balloting is from youngest (in point of service) to oldest, which gives the Chief the opportunity to break a tie. But seniority is observed in the discussions. And since even a member of the Honorable Supreme Court ("oyez, oyez") is the sum of his origins, his past experiences, his mental, moral and glandular make-ups and his will to push his influence, it would be well to look behind the \$100 black silk robes of the nine justices as they speak up.

Whether the case against the Roosevelt court is that it has been "packed" or merely that it squabbles too much or whether it is a vital court as its partisans insist, neither griping nor praise will alter the result. If people want the law to be fundamentally changed, Congress is the only agency that will change it in the foreseeable span of years. And if Republicans want a court in their image, they must win the presidency not only in 1948 but in 1952. Roosevelt's "seven young men" will certainly last until then.

72. CONSTITUTION SUPERIOR TO ACT OF CONGRESS

The outstanding decision in the development of judicial review is that of *Marbury v. Madison*, 1 Cranch 137 (1803), in which the opinion of the United States Supreme Court was written by Mr. Chief Justice John Marshall. The following reading is an excerpt from that opinion.

The question, whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those

intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is

apparent that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

73. FEDERAL COURTS GIVE EFFECT TO STATE LAW

In many instances the law of one of the forty-eight states is the law which determines the outcome of a case in a federal court. An illustration is found in the case of *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538 (1941). The following reading is from the opinion of the United States Supreme Court in that case, delivered by Mr. Justice Reed. Students will want to distinguish the principle on which this opinion is based from that on which the opinion was based in the case of *Ableman v. Booth*, see reading no. 31, *supra*.

The petitioner here, Virginia Vandenbark, the plaintiff below, is a citizen of Arizona. The defendant, respondent here, the Owens-Illinois Glass Company, is a corporation of Ohio. Petitioner brought an action in the United States District Court for the Northern District of Ohio alleging that as an employee of respondent she had contracted various occupational diseases including silicosis through the negligence of respondent. The trial court sustained a motion to dismiss on the ground that the petition failed to state a cause of action. This ruling was affirmed by the

Circuit Court of Appeals with the statement that under the law of Ohio no recovery was permitted, at the time of the judgment in the trial court, for the type of occupational disease alleged by the petitioner to have been contracted by her as the result of respondent's negligence.

It is conceded that at the time the motion to dismiss was sustained neither the Ohio Workmen's Compensation Act nor the common law, as interpreted by the supreme court of that state, gave a right of recovery to petitioner. The constitution of Ohio authorized the passing of laws establishing a state fund out of which compensation for death injuries or occupational diseases was to be paid employees in lieu of all other rights to compensation or damages from any employer who complied with the law. At the time of the dismissal of the petition by the trial court no provision had been made by statute for any of the occupational diseases included in petitioner's complaint. Respondent had fully complied with the Workmen's Compensation Act. The Ohio constitution and compensation statutes passed pursuant to its authority had been consistently construed by the Ohio courts as withdrawing the common law right and as denying any statutory right to recovery for petitioner's occupational diseases. After the action of the trial court in dismissing the petition, the Ohio supreme court reversed its former decisions and, in an opinion expressly overruling them, declared occupational diseases such as complained of by petitioner compensable under Ohio common law.

While *Erie R. Co. v. Tompkins* made the law of the state, as declared by its highest court, effective to govern tort cases cognizable in federal courts on the sole ground of diversity, there was no necessity there for discussing at what step in the cause the state law would be finally determined. In that case no change occurred in the state decisions between the accident and our judgment. There is nothing in the Rules of Decision section to point the way to a solution.

During the period when *Swift v. Tyson* (1842-1938) ruled the decisions of the federal courts, its theory of their freedom in matters of general law from the authority of state courts pervaded opinions of this Court involving even state statutes or local law. As a consequence some decisions hold that a different interpretation of state law by state courts after a decision in a federal trial court does not require the federal reviewing court to reverse the trial court.

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What we conceive, however, to be the true rule to guide a federal appellate court where there has been a change of decision in state courts subsequent to the judgment of the district court was stated, before any of the opinions just cited, in *United States v. Schooner Peggy*. The Court there said

"It is, in the general, true, that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the

appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

Respondent earnestly presses upon us the desirability of applying the rule that appellate courts will review a judgment only to determine whether it was correct when made; that any other review would make the federal courts subordinate to state courts and their judgments subject to changes of attitude or membership of state courts, whether that change was normal or induced for the purpose of affecting former federal rulings. While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law.

Reversed.

MR. JUSTICE McREYNOLDS concurs in the result.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

74. JURIES

Students look to English history for an explanation of the origin of most of the legal institutions in the United States. The reading below¹ discusses juries in England. A comparison of the English jury system with that now in effect in the federal government or in any one of the forty-eight states will emphasize the carry-over from England.

Frederic William Maitland, the author (1850-1906), held the Readership in English Law in the University of Cambridge beginning in 1884. In 1888 he became Downing Professor of the Laws of England at the University of Cambridge. He is credited with the founding of the Selden Society in 1887, which, before Maitland's death, issued twenty-one volumes dealing with the history of different branches of English law. These volumes were edited either by Maitland himself or by men chosen and supervised by Maitland.

The commonest procedure in criminal cases involves the use of two juries, an indicting and a trying jury, or, as we say, a grand and a petty jury. The grand jury is a body of twenty-three persons representing the county, sworn to present criminals. In the past the theory has been that such a jury accuses men of its own knowledge, and, even in our own day, this form is preserved—an indictment even in our own day states that the jurors say upon their oaths that A, of malice aforethought did slay and murder B. As a matter of fact, however, what happens now is this—and we may perhaps carry back the change as far as Henry VII's day—some

¹ From *The Constitutional History of England* by F. W. Maitland (Cambridge University Press, 1920); courtesy of The Macmillan Company.

person who believes that A has committed a crime goes before the grand jury and profers a bill of indictment, a document stating that A has murdered B. The grand jurors hear the evidence for the prosecution, and if they think that this makes it probable that A is guilty, then without hearing any evidence for the defence they write on the bill 'a true bill,' and then A has to take his trial before a petty jury; if, however, they think that there is no ground for suspicion, they write 'no true bill'—the old phrase was 'ignoramus'—we know nought of this—the bill is said to be ignored, and A goes free, though he is liable to be indicted another time for the same offence—he has had no trial, and is not acquitted. A majority of the body of twenty-three grand jurors decides whether the bill shall be ignored or no. So much as to the grand jury.

In the present day, a person who has been indicted must, as a matter of course, stand his trial before a petty jury; he is tried, as we all know, by a jury of twelve, and the jurors are judges of fact—their verdict is based on the evidence of witnesses given before them in court. But in Henry VII's day this was not quite the case—an indicted person was not tried by jury unless he consented to be so tried, but this consent was extorted from him by torture, by the *peine forte et dure*. If, when asked 'how will you be tried?' he refused to say 'By God and my country,' if (as the phrase went) he stood mute of malice, he was pressed under heavy weights until he either died or said the necessary words. So late as 1658 a man was pressed to death, so late as 1726 a man was pressed into pleading, not until 1772 was the *peine forte et dure* abolished. This horrible process was a reminder that trial by jury was not native to English law—there had been a time when to convict a man of crime without allowing him to appeal to God by means of battle or ordeal, had seemed an impossible injustice. The reason why men were found hardy enough to submit to the terrible torture of being pressed to death, instead of escaping with a mere hanging, was this, that if they were convicted they forfeited lands and chattels, if they died unconvicted there was no forfeiture, and thus their families were not ruined.

Another point that we may note is that before Henry VII's day the law had come to demand unanimity of the jurors—unless the twelve agreed there could be no verdict. This rule, as we all know, prevails at the present day; but it only became fixed in the course of the later Middle Ages; it certainly looked at one time as if the law would be content with the verdict of a majority.

We have already seen that procedure by indictment had once been a novelty in English law—a novelty introduced by Henry II: it had taken its place beside the older procedure of an appeal by the party wronged. In Henry VII's day this older alternative still existed, and was still in use—the appellee could either claim trial by battle, or submit to trial by jury. Trial by battle was, however, becoming very unusual. Appeals were not, however, abolished until 1819: their abolition was due to the fact that in 1818, in the celebrated case of *Ashford v. Thornton*, an appeal was

brought, and the appellee claimed trial by battle—the appellor refused to fight.

It is necessary, in order to explain what follows, to understand that before the end of the Middle Ages trial by jury had taken a deep root in the English system, and had already become the theme of national boastings. Fortescue contrasts it favourably with the procedure of the French courts, where there was no jury, and where torture was freely employed. It is a very curious point in European history, that an institution which was once characteristically Frankish, became, in course of time, peculiarly English, and underwent, without losing its identity, the great change which turned the body of neighbour-witnesses into judges of the evidence given by other witnesses.

75. LAW DISTINGUISHED FROM MORALITY

Students of government will do well to keep in mind the distinction between law and morality indicated in the following reading.¹

The author was Sir Paul Vinogradoff (1854–1925), who was born in Russia. In 1887 he was appointed full Professor of History in the University of Moscow. In 1903 he was elected to the Corpus Christi Chair of Jurisprudence at Oxford University, England, where he served for more than twenty years. His writings include: *English Society in the Eleventh Century*, *Roman Law in Mediaeval Europe*, and *Outlines of Historical Jurisprudence*.

COMMON-SENSE IN LAW

CHAPTER I

Social Rules

1. When Blackstone began his Oxford lectures on English law (1753), he felt himself under the obligation of justifying a new academic venture. "Advantages and leisure," he said, "are given to gentlemen not for the benefit of themselves only, but also of the public, and yet they cannot, in any scene of life, discharge properly their duty either to the public or to themselves, without some degree of knowledge in the laws."

Things have moved fast since Blackstone's day, and significant changes have certainly occurred in the educational aspects of law. To begin with, the circle of "gentlemen" who ought to give some thought to laws has been greatly widened: it comprises now all educated persons called upon to exercise the privileges and to perform the duties of citizenship. One need not be a barrister or a solicitor, a member of parliament, a justice of the peace, or even an elector, to take an interest in and feel responsibilities towards laws: all those who pay taxes and own property of any kind, who hire and supply labour, who stand on their rights and

¹ From *Common-Sense in Law* by Paul Vinegradoff. Courtesy of Oxford University Press.

encounter the rights of others, are directly concerned with laws, whether they realize it or not. Sometimes a knowledge of law may help directly in the matter of claiming and defending what belongs to one; on other occasions it may enlighten a juror or an elector in the exercise of his important functions; in any case, every member of the community takes his share in the formation of public opinion, which is one of the most potent factors in producing and modifying law.

5. The close relationship between moral and legal notions is striking. No wonder ancient thinkers, Aristotle for example, included the discussion of the elements of law in their treatment of ethics; and for Socrates and Plato the analysis of right was inseparable from the idea of justice. Nor is it a mere chance that in all European languages, except the English, the terms for law and right coincide—*jus*, *Recht*, *droit*, *diritto*, *derecho*, *pravo*—all mean legal order, general rule of law, notion of right on one side, and the concrete right asserted by an individual on the other. In English, *law* is distinguished from *right*, but rights are based on law, while on the other hand the opposition of right to wrong accentuates the ethical aspect of the notion. Right is that which we find correct, adequate to a certain standard set up by our judgment; wrong is that which is opposed to it. The proposition that two and two make five is wrong according to an arithmetical standard; to repay a benefactor by ingratitude is wrong according to a moral standard; to refuse wages to a labourer may be wrong according to a legal standard, and is certainly wrong from a moral point of view, that is, in the judgment of unprejudiced men and of one's own conscience.

Thus it is certain that law cannot be divorced from morality in so far as it clearly contains, as one of its elements, the notion of right to which the moral quality of justice corresponds. This principle was recognized by the great Roman jurist, Ulpian, in his famous definition of justice: "To live honourably, not to harm your neighbour, to give every one his due."¹ All three rules are, of course, moral precepts, but they can all be made to apply to law in one way or another. The first, for instance, which seems pre-eminently ethical, inasmuch as it lays down rules for individual conduct, implies some legal connotation. A man has to shape his life in an honourable and dignified manner—one might add, as a truthful and law-abiding citizen. The juridical counterparts of ethical rules are still more noticeable in the last two rules of the definition. The command not to harm one's fellow-men may be taken to be a general maxim for the law of crime and tort, while the command to give every one his due may be considered as the basis of private law. And this last precept is certainly not concerned with morals alone: the individual is not required merely to confer a benefit upon his neighbour, but to render to him that which belongs to him as a matter of right.

¹ *Honeste vivere, alterum non laedere, suum cuique tribuere.*

The real difficulty arises when we try to draw a definite line of division between moral and legal rules, between ethical and juridical standards. There are those who would coordinate the two notions on the pattern of the relation between end and means. They look upon ethical rules as determining social ideals, the principles of goodness, virtue, honour, generosity, for which men ought to strive in their personal conduct, and the aims of development, civilization, progress, perfection, which society at large ought to set before itself. Law and laws according to this theory would be the conditions devised for the attainment of such ideals. But such a definition becomes so wide that it includes potentially every case where social influence can be exerted, and one loses the thread of distinction between moral and legal rules. Other jurists have therefore based a distinction on the contrast between theory and practice, or rather between the practicable and the impracticable. In their views law is morality so far as morality can be enforced by definite social action; in other words, it is the minimum of morality formulated and adopted by a given society.

This again is not satisfactory. Many legal rules have nothing to do with moral precepts. If, as the result of the law of inheritance, the eldest son should have his father's estate and the younger brother be cut off with a scanty equipment; or if a statute makes the sale of tobacco a state monopoly: such laws are certainly not suggested by ethical motives. Besides, even when legal rules are connected directly or indirectly with an appeal to right, it does not follow that they are necessarily framed in consequence of moral impulses. The laws as to bills of exchange or payment of rent are dictated by commercial practice or by established vested interests rather than by moral considerations. In short, numberless aims foreign to the ethical standard play a part in legislation and in legal evolution: national interests, class influences, considerations of political efficiency, and so forth. It would be a one-sided conception indeed to regard laws as the minimum of moral precepts.

One thing seems clear at the outset: in the case of legal obligations, we have to deal with precepts of a stricter and more *compulsory* nature than moral duties. It is obvious that in many cases the breach of a moral obligation does not directly involve material retribution, except perhaps in the form of loss of good opinion. Many a rascal takes his way through life without being made to answer for his sins if he takes care not to infringe the prescriptions of the law. It remains to be seen on what grounds this narrower sphere of legal compulsion is marked off.

CHAPTER II

Legal Rules

1. When we speak of a minimum of moral order and of moral rules as contents of law, we imply a principle which has been widely used for the purpose of defining law, namely, the principle of *coercion*. If a mini-

num of duties is considered as necessary for the existence of society, it must be obtained at all costs, and, if necessary, by the exertion of force. Many jurists hold therefore that law is an *enforceable* rule of conduct, in opposition to ethical rules of conduct, which are based on voluntary submission. This line of distinction has the merit of being simple and clear: let us see whether it leads to an exhaustive delimitation. The doctrine asserts, when stated more fully, that every legal rule falls into two parts: first, a *command*, stating the legal requirement; second, a *sanction* providing that if the command is not obeyed, force will be employed against the recalcitrant person. Force may be used in different ways: sometimes in the form of *execution*; here the act which the individual refuses to perform is done against his will by the executive officers of the law: thus if a man refuses to pay a debt, the sheriff will take his money or his furniture to satisfy the creditor. Sometimes instead of a direct recovery or execution, the person injured is allowed to claim *damages*, as in the case of a breach of promise of marriage or of injury to reputation through libel. Sometimes the sanction operates by way of *punishment*; a person who has stolen a purse or broken into a house and abstracted valuable property will be put into prison whether the objects stolen or abstracted are recoverable or not. Lastly, the sanction may consist in the fact that unless certain rules are observed, an intended result cannot be achieved. If a person desires to make a will, but disregards the law which requires that such an instrument, to be valid, must be attested by at least two witnesses, his wishes as to the disposal of his property after death will have no legal effect. It may be said, therefore, that this legal rule is supported by the sanction of *nullity*.

If the object of law is to coerce people into submission to certain rules, the question inevitably arises: who is to wield the power of coercion and to formulate rules provided with the sanction of force? An attempt to answer this question is supplied by a commonly accepted definition of law, which runs thus: *A law is a rule of conduct imposed and enforced by the sovereign*. This definition proceeds historically from the famous teaching of Hobbes. . . .

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6. To sum up: we have seen that legal rules contain declarations as to right and wrong conduct, formulated in accordance with the will of a society and intended to direct the wills of its members. Such declarations will be supported by all means at the disposal of the society which has laid them down, ranging from physical coercion to nullification and exclusion. This being so, law is clearly distinguishable from morality. The object of law is the submission of the individual to the will of organized society, while the tendency of morality is to subject the individual to the dictates of his own conscience. The result has to be achieved in the former case by a combination of wills, co-ordinating them with each other. At the same time it is clear that in every healthy society laws regulating the attribution of power ought to be in harmony with recognized moral precepts;

and substantial discrepancies in this respect are sure to produce mischief in the shape of divided opinions and uncertainty of conduct.

Within the aggregate produced by this combination of wills each component will must have its range of play and power. Therefore law may be defined as a *set of rules imposed and enforced by a society with regard to the attribution and exercise of power over persons and things.*

76. EQUITY SUPPLEMENTS COMMON LAW

The Constitution of the United States, in describing the judicial power (Article III, Section 2) refers to all cases "in law and equity." Historical background given in the following reading¹ will help the student to understand the significance of "in law and equity." The author of this reading is the same (F. W. Maitland) as the one who wrote the selection on "Juries", no. 74, *supra.*

. . . Ever since the Norman Conquest every king has his chancellor, who has the custody of his great seal, and is at the head of the whole secretarial body of king's clerks. When at the end of Henry III's reign there ceases any longer to be a chief justiciar, the chancellor becomes the king's first minister. Robert Burnell, the chancellor, is Edward I's chief adviser. The chancellor is almost always an ecclesiastic—there are a few instances of lay chancellors in the fourteenth century—generally he is a bishop. In many different ways he has for a long time past been concerned in the administration of law. In the first place it has been his duty, or that of his clerks, to draw up those royal writs (original writs) whereby actions are begun in the king's courts of common law. He has also had some judicial powers of his own—in particular, if it be asserted that the king has made a grant of what does not belong to him, it is for the chancellor to hear the matter, and if need be to advise the king to revoke his grant. Then again he has always been a member of the king's council, and what is more, the specially learned member—that he should be acquainted with canon law and Roman law, as well as with the common law of England, was very desirable. Naturally then if questions of law came before the council, the chancellor's opinion would be taken.

As the fourteenth century goes on we find that a good deal of civil litigation comes before the council in one way and another. Persons who think themselves injured and who think that, for some reason or another, they cannot get their rights by the ordinary means, are in the habit of petitioning the king, asking for some extraordinary relief. We must remember that besides the ordinary writs whereby actions at law were begun, writs which were obtained from the Chancery as a matter of course upon payment of the fixed fee, there was a certain power reserved to the Chancery of making new writs to suit new cases, of introducing modifications in the established forms. Sometimes the relief which a petitioner desired was of this kind; at other times he wanted more than this—he

¹ From *The Constitutional History of England* by F. W. Maitland (Cambridge University Press, 1920); courtesy of The Macmillan Company.

wanted that the council should send for his adversary and examine him upon oath. Various excuses for the king's interference are put forward—the suppliant is poor, old, sick; his adversary is rich and powerful, will bribe or intimidate the jurors, or has by accident or trick obtained some advantage of which he cannot be deprived by the ordinary courts. The tone of these petitions is very humble, they ask relief for the love of God and that peerless Princess his Mother, or for His sake who died on the Rood Tree on Good Friday. A common formula is—for the love of God and in the way of charity. Thus the petitioner admits that strictly speaking he is not entitled to what he asks—he asks a boon, a royal favour.

Now the series of statutes and petitions of parliament, to which we have already referred, seems to have been directed quite as much against the interference of the council in civil litigation as against its assumption of criminal jurisdiction—the view of parliament is that the courts of common law are sufficient. Gradually, in the fifteenth century, the council seems to have abandoned the attempt to interfere with cases in which there was a question which the courts of common law could decide, but it became apparent that there were cases in which no relief at all could be got from these courts, and yet cases in which according to the ideas of the time relief was due. I cannot say very much about this matter without plunging into the history of private law—still something ought to be said. It had for many reasons and in many cases become a common practice for a landowner (A) to convey his estate to some friend (B), upon the understanding that though that friend (B) was to be the legal owner of it, nevertheless (A) was to have all the advantages of ownership:—B was then said to hold the land 'to the use of A, or upon trust or in confidence for A.' This dodge, for such we may call it, was employed for a variety of purposes. Thus, for example, A has some reason to believe that he will be convicted of treason—during the Wars of the Roses many persons must have regarded this as highly probable—he desires to prevent his land being forfeited, he desires to provide for his family:—he conveys his land to B upon the understanding that B is to hold it upon trust for, or to the use of, him, A. Then A commits treason,—there is no land to be forfeited—the land is B's and B has committed no crime—still B is in honour bound to let A's heir have the use and enjoyment of the land. The same device was used for the purpose of evading the feudal burdens; the same device was used for defrauding creditors—the creditor comes to take A's land and finds that it is not A's but B's. The same device was largely used by the religious houses in order to evade the statutes of mortmain; they were prohibited from acquiring new lands—but there was nothing to prevent a man conveying land to X to be held by him upon trust for the monastery. The credit or blame of having invented these uses, or trusts, is commonly laid at the door of the religious houses. At any rate, in the early part of the fifteenth century this state of things became very common: B was the legal owner of the land, but he was bound in honour and conscience to let A have the profit of it and to do with it what A might

direct. His obligation was as yet one unsanctioned by law—the courts of common law had refused to give A any remedy against B; they would not look behind B; B was the owner of the land and might do what he pleased with it regardless of A's wishes.

By this time (we are speaking of the early part of the fifteenth century) it had become so much the practice for the king's council to refer all petitions relating to civil cases to the chancellor—the king's chief legal adviser—that petitioners who wanted civil relief no longer addressed their complaints to the king, but addressed them to the chancellor, and the chancellor seems to have commonly dealt with them without bringing the matter before the king and council. Now this device of 'uses, trusts or confidences' of which we have just spoken provided the chancellor with a wide and open field of work. In Henry V's reign we find that the chancellor will enforce 'a use' (as it is called)—if B holds land to the use of A, the chancellor on the complaint of A will compel B to fulfil the understanding, will compel him to deal with the land as A directs—will put him in prison for contempt of court if he refuses to obey the decree:—though B is legally the owner of the land, it is considered unconscionable, inequitable, that he should disregard the trust that has been put in him—the chancellor steps in, in the name of equity and good conscience. No doubt this was convenient; if the chancellor had not given help, in course of time the common law courts would probably have had to modify their doctrines and to find some means of enforcing these 'uses.' But the common law was a cumbrous machine, and could not easily adapt itself to meet the new wants of new times. On the other hand the chancellor had a free hand, and it is by no means impossible that for a long time past the ecclesiastical courts (and the chancellor was an ecclesiastic) had been struggling to enforce these equitable obligations. At any rate when once it had become clear that the chancellor was willing and able to enforce them, a great mass of business was brought before him. It was found highly convenient to have land 'in use.' Parliament and the common lawyers do not like this equitable jurisdiction of the chancellor—sometimes they plan to take it away and to provide some substitute—but it justifies its existence by its convenience, and in the reign of Henry VII we must reckon the Court of Chancery as one of the established courts of justice, and it has an equitable jurisdiction; beside the common law there is growing up another mass of rules which is contrasted with the common law and which is known as equity.

The establishment of such a system of rules is an affair of time. Of the equity of the fifteenth century, even of the sixteenth, we know but little, for the proceedings in the chancery were not reported as those of the common law courts had been ever since the days of Edward I. But this fact alone is enough to suggest that the chancellors did not conceive themselves to be very strictly bound by rule, that each chancellor assumed a considerable liberty of deciding causes according to his own notions of right and wrong. Probably, however, the analogies of the common law

and the ecclesiastical jurisprudence served as a guide. In course of time (this belongs rather to a subsequent stage of our history but should be mentioned here) the rules of equity became just as strict as the rules of common law—the chancellors held themselves bound to respect the principles to be found in the decisions of their predecessors—a decision was an authority for future decisions.

Thus it came about that until very lately, until 1875, we had alongside of the courts of common law, a court of equity, the Court of Chancery. I shall attempt to describe hereafter the sort of thing that equity was in the present century before the great change which abolished all our old courts and the sort of thing that it is at this moment. We are now dealing with past time and must think of the chancellors as having acquired a field of work which constantly grows. They are supplementing the meagre common law, they are enforcing duties which the common law does not enforce, e. g. they are enforcing those understandings known as uses or trusts, and they are giving remedies which the common law does not give, thus if a man will not fulfil his contract, all that a court of common law can do is to force him to pay damages for having broken it—but in some cases the Chancery will give the more appropriate remedy of compelling him (on pain of going to prison as a contemner of the court) to specifically perform his contract, to do exactly what he has promised. Then again the procedure of the Court of Chancery differed in many important respects from that of the courts of law; in particular, it examined the defendant on oath, it compelled him to disclose what he knew about the facts alleged against him. Popular the Court of Chancery never was, but the nation could not do without it—and so gradually our law acquired what for centuries was to be one of its leading peculiarities; it consisted of a body of rules known as common law supplemented by a body of rules known as equity, the one administered by the old courts, the other by the new Court of Chancery.

77. FREEDOM UNDER LAW

Students of American government will give serious consideration to the rise of administrative law and its relationships to federal government and to individual freedom. The following reading¹ is most stimulating to thought on such points. Some students will find time to pursue the subject further in books like *Administration and the Rule of Law* by J. Roland Pennock.

Is there any similarity in the factors responsible for the rise of Equity in England several hundred years ago, and those responsible for the rise of Administrative Law in the United States today?

The author of this article is Roscoe Pound (b. 1870), one of America's most outstanding jurists. He served as Dean of the Law Department at the University of Nebraska (1903-1907) and taught law at Northwestern University (1907-1909), at the University of Chicago (1909-1910), and at Harvard University (1910-

¹ From *Administrative Law: Its Growth, Procedure and Significance* by Roscoe Pound, University of Pittsburgh Press, 1942. Used through courtesy of the Press.

1917). From 1916 to 1936 he was Dean of the Harvard Law School. His writings include: *The Spirit of the Common Law*; *Criminal Justice in America*; *Contemporary Juristic Theory*; *Social Control Through Law*; and *The Task of Law*.

By Roscoe Pound

It has always been recognized that alongside the law, which treats the individual case as one of a type to be determined by a general precept applicable to all cases of that type, there must be some agency of individualization treating cases according to their unique features. Aristotle gave us a theory of individualization. Equity both at Rome and in England arose to meet this need. But always in their beginnings those agencies of individualization operate not only unsystematically but arbitrarily and one-sidedly. The Institutes of Justinian tell us that Augustus first enforced testamentary trust inheritances "being moved by favor of persons." We are told that the Frankish kings gave relief "*secundum aequitatem*" to those whom they had taken under their special protection. The English chancellors at first gave relief out of "alms and charity" and bills in equity of the reign of Henry V claimed relief on the ground that the complainant was a widow or was an old soldier who had fought for the king in his wars in France. If not the Praetor, certainly Emperor and King and Chancellor seem to have acted at first without rule or principle on general notions of sympathy for a wronged or a weaker party. That in the sixteenth century and the fore part of the seventeenth century English equity was largely justice without law no doubt commended it for a time to a busy and impatient age, as offhand administrative justice commends itself to an age in some respects similar today. We may well compare the courts developed in and for feudal England, struggling to meet the wants of England of the Reformation by a medieval procedure and feudal property law, with American courts, developed in and for the pioneer or agricultural communities of the first half of the nineteenth century, struggling to meet the wants of today with the organization and procedure and substantive law devised for such communities.

At the beginning of the present century there were six points of pressure upon our law. One was the need of better provision as to industrial accidents growing out of wholly changed conditions of work with machines and in mills and factories. Another was the increasing need of adjustment of relations of employment in view of claims to vested rights in one's job. Still another arose from what we were wont to call social legislation which called for more assured and speedy enforcement and more effective preventive action than had been true of the lawmaking of the past. Again, there were the demands of life in crowded urban communities, such, for example, as traffic regulation. Likewise, the great increase in the volume of litigation called for simpler and speedier procedure. Finally, there were new demands on the legal order in an age of secularization in which the law was called on to do much which had been in the

province of the home and the church. To some extent these causes of pressure upon legal institutions were operative everywhere. But there were special reasons for dissatisfaction with judicial justice which were more immediately American.

One was over limitation of administrative agencies in the face of increasing need of administrative direction and individualization and call for administrative application of standards in many fields of adjustment of relations and regulation of conduct. For historical reasons our formative era distrusted administration, of which we had experienced much in colonial times, and that distrust led to overdevelopment of the inherited common-law attitude toward administrative agencies. Secondly, the archaic organization of courts and hypertrophy of procedure which obtained in nineteenth-century America stood in the way of effective judicial handling of matters of much urgency calling for quick and effective disposition. In the distrust of the executive which obtained for the first century of our constitutional existence, there was much in the way of attempts at legislative and judicial administration. For example, there were statutes devolving regulation of grade crossings of one railroad by another on courts of equity as late as the seventh decade of the last century. Our procedure was not equal to such things, even if they had been adapted to judicial justice. The attempt to handle them by special legislation or by administrative proceedings in court inevitably broke down and turned attention to the possibilities of executive justice.

Most of all, however, a bad balance between judiciary and administration was brought about for a time by a mistaken attempt to carry out the doctrine of separation of powers to an analytical logical extreme. In largest part our difficulties with that doctrine have arisen from nineteenth-century analytical attempts to maintain theoretical absolute lines. It was assumed that every power and every type of governmental action must of necessity be referable once for all, exclusively and for every purpose to some one of the three departments of government. The sound legal political sense of John Marshall saw long ago that there were powers of doubtful classification—powers which analytically or historically or from both standpoints might be assigned to either of two departments. In such cases he saw that it could well be a legislative function to assign exercise of the power to an appropriate department. But it was not till the second decade of the present century that this solution became established in the decisions in the face of analytical attempts to put everything for all purposes and exclusively in one place. New York at one time would not allow a court of equity to carry out a charitable trust *cy pres* because the power, if historically judicial, was thought not to be so analytically. We were awakened to the impossibility of such doctrine by the exigencies of rate making. The courts and the profession came to see that regulation of procedure and regulation of legal education and admission to the bar and organization of the bar by rules of court, if analytically they might be held legislative in nature, were historically judicial. Legislation turning these matters over to

the courts and legislation turning rate making and application of standards over to administrative agencies do not derogate from the constitutional separation of powers. In practice we have come to a combination of analytical and historical criteria tempered by recognition that there are powers of doubtful classification which may be exercised by either of two appropriate departments as the legislature may decide. But the older analytical logical idea long hampered administration.

Dissatisfaction with the judicial administration of justice as it had come to be in this country and consequent turning to administrative adjustment of relations and ordering of conduct is not, however, the whole story of the urge to free administrative agencies from legal checks and judicial review which has become increasingly manifest in recent years. A contributing cause has been the rise of the executive to leadership in our polity, coincident with a movement toward personal government and executive absolutism throughout the world. So far as ours is an English polity, it derives from seventeenth-century rather than from eighteenth-century England. It is a polity of the era of the Puritan Revolution not of the era of the French Revolution, and much less one of the era of the Russian Revolution. As I have said on other occasions, an American president or governor is analogous to a Stuart king. The latter ruled with Parliament and with the courts if he could, and in spite of them if he must. In like manner a president or governor governs with the legislature and the courts if he can and in spite of them or some one of them if he must. In practice, the relative position of the legislative, the executive, and the judicial departments in our governments, national and state, has shifted. From independence to the Civil War the hegemony of the legislative department is clear enough. Legislators thought of themselves as peculiarly the representatives of the sovereign people, with all the powers of that sovereign devolved upon them. They asserted that courts were accountable to them for decisions. As late as the impeachment of Andrew Johnson it was confidently asserted in Congress that the executive was accountable to the legislative for exercise of powers committed to the executive by the constitution. In the fore part of the nineteenth century there was an idea of legislative omnicompetence analogous to the idea of administrative omnicompetence which we may see today. The legislative was the first of our departments of government to develop. It had become well developed in characteristic American form by the end of the seventeenth century. Organization of the judiciary in courts manned by judges and distinction between judges and magistrates with general administrative powers has its significant beginning at the end of the seventeenth century when legislative development was substantially complete. Before the Revolution the executive was a royal governor who could afford no model for us after independence. The executive departments in our governments, national and state, had to be developed after independence.

After the Civil War the hegemony shifted for a time to the judiciary. Almost every act of legislation and of administration encountered judicial

scrutiny, and the analytical attempts at exact and detailed assignment of every feature of governmental action exclusively to one department, of which I have spoken, and attempts to reduce the standard of reasonableness, prescribed in the bills of rights, to detailed rules analogous to rules of property, gave the judiciary for a time too much weight in the scale, as the legislature had formerly attained an over weight. In the present generation the hegemony has quite as definitely shifted to the executive. I need not go into the economic and political causes of this. But the resulting over weighting on the executive side has furthered the development of ideas of administrative absolutism. This need not mean, however, that we are to give up what has been fundamental in our polity from the beginning. In the past, the balance has come back. Thus far no department of government has been able to make its temporary leadership permanent. The essentials of the system of balance and distribution of powers have remained.

Yet while the hegemony of the executive for the time being and the rise and development of administration do not of themselves call for a giving up of our constitutional legal polity, certain fashions of recent academic thinking and teaching, and certain philosophical ideas current throughout the world tend toward a regime of administrative government, a law unto itself and free of constitutional checks judicially enforced. There has been no fundamental law in England since 1688. But the seventeenth-century judges believed in one and Lord Holt as late as 1701, a dozen years after the revolution which established the absolute authority of Parliament, still held to that belief. The English books which were read in this country before and at the American Revolution, taught the doctrine of a fundamental law and the colonies each had such a law in its charter. In 1776, Virginia in its constitution and bill of rights set up a fundamental law and the federal constitution and the state constitutions thereafter followed this example. The English Court of Common Pleas had enforced the separation of spiritual and temporal jurisdiction as fundamental law in the sixteenth century and twice in the fore part of the seventeenth century the Common Pleas had laid down that Parliament could not make a man a judge in his own case. Nineteenth-century English writers brought up on the doctrine of absolute sovereignty in Parliament, to whom that seems as natural and inevitable as the separation of powers seemed to the nineteenth-century American lawyer, have engaged in no little logical acrobatics to fit these cases into the ideas of the polity which has obtained since 1688. English writers and English trained teachers have brought ideas of parliamentary or legislative absolutism to this country and reinforced the dissatisfaction with judicially enforced fundamental law which grew up at the end of the last century.

Thus there has grown up a teaching that balance of nation and state, balance of legislative, executive, and judicial, both in nation and in state, is an outmoded idea of the eighteenth century. It is said to belong to the age of etiquette, the age of overrefinement, when every practical activity

was embarrassed by ceremonial and checks; when the colonel of an English regiment could in the midst of battle take off his hat to the colonel of the French regiment opposing him and say, "Gentlemen of the guard, fire first"; when soldiers went into the field dressed for the ballroom, when a force sent on a forced march to rescue their comrades could come on the field too late because they had to halt ten times in a mile to dress ranks, when an army could be surprised because its thoroughly drilled pickets marched up and down their beats with their eyes to their front after the manner of the barracks drill ground. Much of the spirit of that time did get into legal procedure. But the political system of checks and balances goes farther back and is quite independent of eighteenth-century fashions.

If we are inclined to give up the distribution of power between nation and states and to set up omniscient central administrative agencies reaching out into every locality and dealing in their own way, free of effective judicial review, with every form of enterprise and activity, we must pause to remember that only a federal government or an autocracy can rule a domain of continental extent. Confederacies and leagues have fallen apart. Consolidations of independent states, unless in a limited domain, have developed into autocracies. The German-Roman empire of the Middle Ages fell apart. It was neither autocratic nor federal. The British Commonwealth of Nations has fallen apart politically. Russia has only changed its type of autocrat. On the other hand, the United States and Canada and Australia and South Africa show us what we may well call continental domains held together politically, sometimes under great strain, by a federal polity. Where the domain is so large, the choice in the end is between federal government and autocracy. Federal government in its very nature calls for balance, balance of national and local government, balance of government and individual. Balance can only be maintained by a constitution which is the fundamental law. A federal government must be a government under law. In Canada, Australia, and South Africa, where there is a federal government, a balance of the national and the local, a distribution of powers, and a constitution which is the supreme law of the land, courts have to and do pronounce legislative and administrative action *ultra vires* just as we should call it unconstitutional.

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Perhaps partly in reaction from the overenthusiasm for Magna Carta in the formative era of our institutions, but largely as a phase of the political philosophy of give-it-up, teachers of politics now tell us that Magna Carta was nothing but a compact between the King and his tenants in chief and is to be interpreted as an expression of the class selfishness of the barons. That colony after colony claimed Magna Carta as its birth-right and that many colonies enacted it as a declaration of their fundamental law was, we are told today, a mere fashion. Magna Carta is a lawyer's myth. But Magna Carta as the lawyers knew it was more than a

compact between King and barons to be given an economic interpretation in terms of the twelfth century. Its significant feature for the future was its general provisions for redress of the common grievances of all. It called for reasonable fines, proportioned to the offense and the offender. It called for justice as something of right, not to be sold, denied, or delayed. It called for security of property, which was not to be taken for the King's purposes without the old customary payment. It called for security of the person. The free man was not to be imprisoned or banished or outlawed or disseised or deprived of his established privileges without a lawful judgment or otherwise than according to law. These general provisions, even if devised for particular grievances of a particular class in a particular time and place, were applicable to like grievances in any time and place. Moreover, without professing to deal in universals, Magna Carta responded to a fundamental and universal problem of human nature. The very features of human nature that make government and law necessary, yet make government and its legal agencies dangerous to the freedom they are set up to maintain and further. The English in the Middle Ages found how to have a strong central government along with local self-government, a strong administration tempered by strong courts and the doctrine of the supremacy of law. That is the polity we inherited and developed. As Mr. Justice Miller put it, the theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere.

Teachers have been telling us that the separation of powers was another fashion of eighteenth-century thought derived from a forecast made by Aristotle, for there was nothing of the sort in his time, and a mistaken interpretation of the British polity of his time on the part of Montesquieu. We are taught that it, too, is outmoded and ought to give way to the exigencies of administration in the polity of today. Recently this has spread to at least one of the courts which intimates that the fundamental principle of our constitutions should not be taken too seriously under the conditions of the time. Nothing could be more mistaken. It was a part of the demand for a frame of government, a political doctrine of the Puritan Revolution which got a foothold in the contests between the courts and the crown in the seventeenth century. It was taken up in colonial America along with the doctrine of the supremacy of the law in the form given that doctrine in Coke's Second Institute. That book, printed by order of the Long Parliament, was hardly less than a legal political Bible to the framers of our polity. The common-law rights of Englishmen as expounded by Coke in his commentary on Magna Carta were claimed as the birthright of Americans not only in the political writing of the time but in the Declaration of Rights of the Continental Congress in 1774. Later, when it was sought to find a philosophical basis for the accepted claim, American writers turned to Montesquieu. The common-law rights of Englishmen were claimed as the natural rights of men and each were taken to be incompatible with unlimited centralized power.

It was not without good reason, based on experience, that Americans,

almost at the moment independence was declared, set up written frames of government or constitutions and put the separation of powers at the foundation and a bill of rights in the forefront of them. From the beginning down to the Revolution the colonies had been subject to a completely centralized government with no distribution of powers and had learned what this sort of government meant. Ultimately all power over what went on in the colonies was centralized in the Privy Council. It had ultimate legislative power to the extent that it could disallow all colonial statutes. It could thus veto any statute within five years, and at any later time, even if it had not been disallowed, could hold it void as in conflict with the colonial charter. It prevented a necessary organization of courts in Pennsylvania for twenty-one years. It overturned legislation making a modern provision for treating land as part of the estate of a decedent along with personalty. It disallowed statutes limiting appeals to Westminster from colonial courts. It insisted that colonial organization of courts follow the English model, and forced a regime of separate probate courts and separate courts of equity where the good sense of more than one colony sought to anticipate the unification of courts to which we are now moving.

Also the Privy Council had ultimate administrative power, controlling administration through instructions to the royal governors and requiring of the governors reports and addressing to them inquiries as to what they and the local magistrates were doing. Likewise, the Privy Council had ultimate judicial power. Appeals lay to it from the courts of the colonies and it jealously guarded its appellate jurisdiction against colonial legislation as to jurisdictional amount and time of taking appeals. The expense of such appeals was a heavy burden upon litigants, and one colony voted an appropriation to an appellee to enable him to defend his judgment at Westminster. All the powers of government were concentrated in this body, which, as might be expected of a body of laymen, made little or no distinction as to the capacity in which it was acting for the time being. Thus when Georgia was under the rule of trustees, in whom all power was concentrated in this way, a defeated litigant in the Town Court of Savannah wrote a letter to the trustees giving his version of the case and complaining of the judgment. The letter having been read to the trustees, they at once made the cause their own and had a letter sent to the governor directing him to order the court to reverse its judgment.

In almost all of the colonies the same condition of centralized powers of government obtained. The governor was appointed by the crown and often he appointed the council. The Governor and Council were the upper house of the legislature. The Governor and Council were the head of administration. The Governor and Council were usually the highest appellate court, subject to review by the Privy Council. One need not say that this undifferentiated authority was exercised in the administrative manner. In South Carolina, it was exercised in one case in an administrative legislative act to take one man's land from him to give it to another. After the

Revolution the highest court of the state held this act void as being in contravention of Magna Carta which had been received by colonial legislation as the fundamental law of the colony. Experience of this sort of thing in the seventeenth and eighteenth centuries led to the express and emphatic constitutional prohibitions of them in the constitutions which followed on the heels of the Declaration of Independence.

Experience of government by centralized agencies in which all power was reposed without limitation was also behind constitutional restraints upon legislation. Such restraints imposed by fundamental law had been preached by Coke and admitted by Holt. One cannot wonder that this doctrine was received in America and put in the bills of rights after independence when he reads the high-handed statutes, interfering with every sort of individual conduct and belief and teaching of which the colonial legislatures were continually guilty, or the statutes probating wills rejected by the courts, dictating the administration of particular estates, suspending the statute of limitations for a litigant in a particular case, and exempting a particular wrongdoer from liability for a particular wrong for which his neighbors would be liable, with which colonial statute books are filled. Indeed, it was not without some struggle that the courts enforced the constitutional separation of powers against such lawmaking. I have seen these statutes cited to show that our forebears believed in omniscient legislatures and all-embracing regulation. But I submit that the bills of rights and the early cases under state constitutions affirming restraints upon legislative power show that they did not. The polity proposed by some, in which there is to be a fourth department, the administrative, in which full legislative, administrative, and judicial power is to be concentrated, is a reversion to the seventeenth and eighteenth-century type of absolute government, on the model of the old regime in France, and to the type of government in colonial America which led to the Revolution.

Let me repeat. I am not attacking administration as a means of government in the society of today nor deploring the rise of administrative justice and delegation to administrative agencies of rule making, application of standards, or determination of facts necessary to the exercise of their functions. But administration is not all of the ordering of human relations. We may pay too high a price for efficiency. We must pay a certain price for freedom; and a reasonable balance between efficiency and individual rights is that price. If the balance does not leave absolute power to administrative agencies, it does not follow that it may not leave them enough power to function intelligently and effectively under a government of laws and not of men. I grant that a government of law must yet be a government of men. Laws govern as they are applied by men. But they may and should be applied by men according to law. Ideas of a fourth department, set up by legislation, come partly from study of the English polity since 1688 as something inhering in the nature of political theory, and partly also from the effect of French treatises on administrative law

which hand down a tradition of administrative independence and administrative review derived from the old, pre-revolutionary regime. We have no need of turning to either for guidance. In an age of absolute governments we showed the world the possibilities of a free people ruling under law.

We are in no wise bound to concede that our legal political theory is logically and philosophically untenable. The proposition that it is logically unsound depends upon a postulate as to the nature of government which we have denied from the beginnings of legal and political thought in the New World. Even if we accept the proposition of skeptical relativism that starting points are not demonstrable, the postulate that government must mean absolute government is one of those undemonstrable starting points. American lawyers have often been reproached for assuming that the constitutional polity under which they were brought up was a legal political order of nature. But Continental publicists assume with no more warrant that a theory derived from Justinian's law books and developed by the lawyers of the old regime in France must be a necessary starting point in a science of politics. At any rate, the American lawyer may invoke the pragmatist criterion. Our theory has worked—to adapt the answer of Diogenes, *solvitur gubernando*. Continental European theories have yielded no such results.

XIII

The President



- 78. "COUNTING THE ELECTORAL VOTE"
- 79. PRESIDENTIAL SUCCESSION
Rankin, "Presidential Succession in the United States"
- 80. "THE PRESIDENT OF THE UNITED STATES"
Wilson, *Constitutional Government in the United States*
- 81. A VETO MESSAGE
Truman on "rider"
- 82. LIMITS ON POWER OF PRESIDENT
Humphrey's Executor v. United States

EXPANSION of the executive branch of the government of the United States in recent years suggested the grouping of readings in this chapter under "The President" apart from the subsequent chapter on "National Administration."

For a sample of an executive order published in the *Federal Register*, see reading no. 21, *supra*. For current information about agencies in the executive branch, see the latest edition of the *United States Government Manual*. A chart accompanying a report dated May 2, 1947, presented to the Senate by the Committee on Expenditures in the Executive Departments shows more than 2,300 units in the *executive branch* of the national (federal) government of the United States, with a total of more than 2,285,000 employees, as of December 31, 1946.

THE PRESIDENT



78. COUNTING THE ELECTORAL VOTE

Emphasis on the extra-legal party activities in the election of the President of the United States has resulted in confusion in the minds of many as to the legal method in which the President is actually elected. See references to nominating conventions made by Woodrow Wilson in reading no. 80, *infra*. The following reading from the *Congressional Record*, Volume 91, Part 1, will help students keep in mind the Constitutional provisions as to the election of the President.

HOUSE OF REPRESENTATIVES

Saturday, January 6, 1945

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At 12 o'clock and 56 minutes p.m., the Doorkeeper, Mr. Ralph R. Roberts, announced the Vice President of the United States and the Senate of the United States.

The Senate entered the Hall, headed by the Vice President of the United States and the Secretary of the Senate, the Members and officers of the House rising to receive them.

The Vice President took his seat as the presiding officer of the joint convention of the two Houses, the Speaker of the House occupying the chair on his left.

The VICE PRESIDENT. Mr. Speaker and gentlemen of the Congress, the Senate and the House of Representatives, pursuant to the requirements of the Constitution and laws of the United States, have met in joint session for the purpose of opening the certificates and ascertaining and counting the votes of the electors of the several States for President and Vice President. Under well-established precedent, unless a motion shall be made in any case, the reading of the formal portions of the certificates will be dispensed with. After ascertainment has been made that the certificates are authentic and correct in form, the tellers will count and make a list of the votes cast by the electors of the several States.

The tellers, Mr. GREEN and Mr. AUSTIN, on the part of the Senate,

and Mr. WORLEY and Mr. GAMBLE, on the part of the House, took their places at the desk.

The VICE PRESIDENT. The Chair hands to the tellers the certificates of the electors for President and Vice President of the State of Alabama, and they will count and make a list of the votes cast by that State.

Mr. GREEN (one of the tellers). Mr. President, the certificate of the electoral vote of the State of Alabama seems to be regular in form and authentic, and it appears therefrom that Franklin Delano Roosevelt, of the State of New York, received 11 votes for President, and HARRY S. TRUMAN, of the State of Missouri, received 11 votes for Vice President.

The tellers then proceeded to read, count, and announce, as was done in the case of Alabama, the electoral votes of the several States in an alphabetical order.

The VICE PRESIDENT. Gentlemen of the Congress, the certificates of all the States have now been opened and read, and the tellers will make final ascertainment of the result and deliver the same to the Vice President.

The tellers delivered to the Vice President the following statement of the results:

The undersigned, THEODORE FRANCIS GREEN and WARREN R. AUSTIN, tellers on the part of the Senate, EUGENE WORLEY and RALPH A. GAMBLE, tellers on the part of the House of Representatives, report the following as the result of the ascertainment and counting of the electoral vote for President and Vice President of the United States for the term beginning on the 20th day of January 1945:

The state of the vote for President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of electors appointed to vote for President of the United States is 531, of which a majority is 266.

Franklin D. Roosevelt, of the State of New York, has received for President of the United States 432 votes;

Thomas E. Dewey, of the State of New York, has received 99 votes.

The state of the vote for Vice President of the United States, as delivered to the President of the Senate, is as follows:

The whole number of the electors appointed to vote for Vice President of the United States is 531, of which a majority is 266.

Harry S. Truman, of the State of Missouri, has received for Vice President of the United States 432 votes;

John W. Bricker, of the State of Ohio, has received 99 votes.

This announcement of the state of the vote by the President of the Senate shall be deemed a sufficient declaration of the persons elected President and Vice President of the United States, each for the term beginning on the twentieth day of January, 1945, and shall be entered, together with a list of the votes, on the Journals of the Senate and House of Representatives.

The VICE PRESIDENT. Gentlemen, the purpose for which the joint session of the two Houses of Congress has been called, pursuant to Senate Concurrent Resolution 1, having been accomplished, the Chair declares the joint session dissolved.

The Senate will remain in the House Chamber pursuant to Senate Concurrent Resolution 2, and receive a message from the President of the United States.

79. PRESIDENTIAL SUCCESSION

The death of President Franklin D. Roosevelt focused attention on the provisions for filling the vacancy in case of the death or incapacity of a Vice President who had assumed the duties of President. Pro-and-con discussions of proposals as to Presidential succession will be found in the *Congressional Digest* for March, 1946. In 1947, the succession was changed so that the Speaker of the House of Representatives would be next in line after the Vice-President. The article below¹ furnishes background for a consideration of the question of the best plan of succession.

Robert S. Rankin, the author (b. 1899), is Professor of Political Science at Duke University. His writings include *When Civil Law Fails* and *Readings in American Government*.

PRESIDENTIAL SUCCESSION IN THE UNITED STATES

By Robert S. Rankin

The attitude of Congress toward presidential succession resembles that of the farmer who never repaired his roof because during fair weather it was unnecessary and when it rained it was too late. Ordinarily presidential succession receives scant attention; but, when a Vice President takes over the office of President and there is no Vice President, concern over the question of succession in some instances approaches a state of panic. Voters select the President and Vice President but beyond this point it is necessary to vest the line of succession in officers of the United States who were not selected for this high office. It is probable, therefore, that no plan of succession will ever meet with the unanimous approval of Congress or of the people.

The constitutional fathers realized that a definite line of succession was both necessary and desirable but did nothing about it except to pass the responsibility to Congress. In Article II, Section I of the Constitution, Congress is given power to declare, when there is neither a President nor a Vice President, "what officer shall then act as President, and such officer shall act accordingly until the disability is removed or a President shall be elected." The method of succession is thus left to Congress to determine.

One very remarkable fact is that while Presidents and Vice Presidents have died in office, never has any other officer been called upon to fill the office of President. Presidents W. H. Harrison, Taylor, Lincoln, Garfield, McKinley, Harding, and F. D. Roosevelt died while holding office. The Vice Presidents who have died in office are George Clinton, Elbridge Gerry,

¹ "Presidential Succession in the United States" by Robert S. Rankin, in *The Journal of Politics*, February, 1946. Courtesy of the *Journal*.

William R. King, Henry Wilson, Thomas A. Hendricks, G. A. Hobart, and James Sherman. It may, therefore, be seen that the danger of losing both the President and the Vice President is indeed a real one.

The first Vice President to assume the office upon the death or disability of the President was John Tyler. When notified by Harrison's cabinet of the death of the President he was addressed as Mr. Vice President. Nevertheless, John Tyler, realizing that he was creating a precedent assumed the title "President" and all the perquisites that go with the office. Many, however, objected to Tyler's use of this title. In the House of Representatives McKeon of New York made a motion to amend the notification sent to the President that Congress was ready for business by striking out the word "President" and substituting the words "Vice President now acting as President." The motion was not approved. Although there was no record vote taken on this motion a similar one introduced in the Senate was defeated by a vote of thirty-eight to eight and Mr. Tyler's title became the "President of the United States."

Another matter of importance was settled at this time. The office of Vice President being vacant, considerable discussion arose as to whether the president *pro tempore* of the Senate automatically became the Vice President. It was determined that Senator Southard should continue as the presiding officer of the Senate and that the office of Vice President should remain vacant.

Pursuant to the power granted in the Constitution, Congress has passed two acts outlining the rules of succession. The first act passed Congress in 1792 and provided for the succession of the President *pro tempore* of the Senate and then the Speaker of the House. Should either of these men ever serve as President he would act only until a new President could be selected by a special election for a four year term.

This act was criticised on the ground that it violated the doctrine of separation of powers by having a legislator take over the highest executive office. The same criticism has been brought against the recent proposal of President Truman which provides for the Speaker of the House to succeed to the presidency. The second criticism of the Act of 1792 was that neither officer might be able to meet the constitutional requirements for the office of president. The third was that it would destroy the timing of elections and the holding of office by having the election for a new President occur not at the usual time but as soon as possible after making the necessary arrangements. Finally, this act did not take care of the situation that might exist if a new Congress had not yet been organized and the presiding officers of both houses had not been selected. After the death of Garfield, Arthur took office before the organization of the new Congress and before the establishment of the line of succession. During Grover Cleveland's first term, Mr. Hendricks, the Vice President, died before the organization of Congress. As a result of this situation, Grover Cleveland did not take unnecessary risks, even refusing to make the trip to attend the funeral of Mr. Hendricks. For this he was severely criticised,

but to him it seemed essential that all precautions be taken so as not to leave the nation without a chief of state.

Several other interesting and even critical situations developed while this rule was in effect and none increased popular satisfaction with the act. If Andrew Johnson had been found guilty by the Senate of the impeachment charges brought against him by the House, Ben Wade of Ohio, the President *pro tempore* of the Senate, would have become President. Notwithstanding his great personal interest in the outcome of the trial, "Bluff Ben" Wade with unruffled countenance took the oath to judge the guilt of Andrew Johnson. After listening to the evidence his vote was "guilty." While there was no legal barrier preventing Wade from voting he had been a severe critic of Johnson and had worked to secure the deposition of the President.

The immediate occasion that brought about the repeal of this act and the passage of the Presidential Succession Act of 1886 was the state of affairs that existed during Cleveland's first term immediately after the death of Mr. Hendricks. Cleveland was the first Democratic President to hold office since James Buchanan. Yet this hard earned victory of the Democratic party was put in jeopardy by the death of the Vice President. Should anything have happened to President Cleveland the President *pro tempore* of the Senate would have become President. At that time the Republicans had a majority in the Senate and its presiding officer was John Sherman, a Republican. Some Republicans advocated taking advantage of this situation. Thomas Reed appealed to the partisan spirit of his fellow Republicans by asking, when the succession act was before the House, whether they would prefer having Bayard, the Secretary of State and a Democrat as the next President or John Sherman.

This suggestion failed to receive support but it did bring to the attention of the political leaders the inadequacy of the law and was largely responsible for the passage of the Presidential Succession Act of 1886 which establishes the line of succession in the Cabinet. The chief merits of this act are: it continues the line of succession in the executive department; it continues the line of succession in the party; and, lastly, it provides succession down to the seventh degree giving reasonable assurance that some person will qualify insofar as the legal requirements for the office of President are concerned.

The chief criticism of this statute has been ambiguity. The act merely states that the Cabinet officer who qualifies "shall act as President until the disability of the President or Vice President is removed or a President shall be elected." Uncertainty exists as to whether a Cabinet officer, under this statute, becomes President or acting President and whether he fills out the unexpired term or holds office only until a special election can be held. Also a reasonable conclusion is that the person who might succeed to the office of President continues to act as a Cabinet officer during the time that he is acting as President.

Many persons assume that the line of presidential succession extends

from the Secretary of State to the Secretary of Labor in order of the establishment of the offices. This is not true. At the time of the passage of this Act there were only seven cabinet officers. These are mentioned by name in the Act. Secretaries of Agriculture, Commerce, and Labor all have been established since 1886. No amendment to the original Act has ever been passed so as to include these officers. As a result, succession ends with the Secretary of the Interior.

One might question the necessity of extending presidential succession to this degree since never in the nation's history has it been necessary to go beyond the Vice President to secure a chief executive. However, once a definite line was established in the Cabinet no objection has been raised with respect to this point. While there is little probability that a Secretary of the Interior will ever succeed to the presidency, an emergency might arise when the people would be pleased that succession extends that far. In this day of perilous living and mass disasters anything may happen. Over a century ago President Tyler with members of his cabinet and other officials made a pleasure trip down the Potomac on the warship *Princeton*. During the day guns were fired and toward the end of the trip the captain of the vessel was prevailed upon to fire a final shot from a large gun located in the bow. When the gun was fired it exploded and many persons were killed, including two members of the cabinet. President Tyler, luckily, was detained below and escaped the catastrophe. On the trip to Berlin to attend the Potsdam conference, President Truman and Secretary of State Byrnes traveled in separate planes in order to minimize the effects of a plane disaster upon the presidency, should an accident occur.

From 1886 until the death of Franklin Roosevelt little active opposition was raised to the provisions of the succession act. However, in May, 1945, James A. Farley called attention to the undemocratic procedure permitted by this act in allowing the Vice President, once he has succeeded to the presidency, to name his successor. Farley's criticism was applauded by the press and demands were made that this "horse and buggy legislation that has been on the books for 60 years," be repealed.

Although public interest in the matter quickened, President Truman's message to Congress on June 19, 1945, urging a new presidential succession act came as a surprise. In this message the President based his demand for a change upon the belief that in a democracy the power to choose his successor should not rest with the chief executive and that, insofar as possible, this office should be filled by an elective officer. Of all the elective officers it was the opinion of the President "that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves." He placed the Speaker above the President *pro tempore* of the Senate in the line of succession because "members of the Senate are not so closely tied by the elective process to the people as the members of the House of Representatives." Beyond the presiding officer of the Senate, succession passed to the cabinet officers in the order of the establishment

of their offices. The holding of the office of president was to be for a short time only, for an election was to be held as soon as possible to fill out the unexpired term.

The President's recommendations were incorporated into a bill (H. R. 3587) which was introduced by Mr. Sumners of Texas and referred to the Committee on the Judiciary. It received the hearty approval of the House. Several amendments were made in the measure, the most important of which was to omit the section of the bill providing for a special election to fill out the unexpired term. The measure passed without a roll call and with little debate. While the bill was before the Senate, the appointment of Mr. Byrnes as Secretary of State changed the situation and the Senate, from all indications, plans to take no immediate action upon this matter.

The first popular reaction to the new plan of succession was one of approval. Gradually, however, uncertainty has arisen as to whether the measure improves the situation. Admitting the faults of the Act of 1886, little improvement is secured by this new proposal. Many, like James Farley, applauded the action of the President, but warned against undue haste.

Several criticisms of this bill as passed by the House can be raised that deprive the measure of many of its so-called advantages. In the first place, while granting that the Vice President under the Act of 1886 has the unique power of choosing his successor, the procedure is not as bad as it appears. A party's tenure in office is determined by the clock. A President is elected for a term of four years. This is not only the term of the President but measures the time that the President's party has been designated to manage the executive branch of the government. The Secretary of State, although appointed by the President with the consent of the Senate, is, in nearly all instances, a man who ranks high as a party man and, therefore, would assure party control of the executive branch.

A second criticism is that the Speaker of the House might be a member of the opposition party. This has occurred several times in the history of Congress. In 1916 Woodrow Wilson was elected President but the Republicans won control of the House. To overcome a situation brought about by a similar occurrence in the Senate was the primary purpose of the Act of 1886. The objections brought against the Act of 1792 can now be brought against this measure.

A third criticism is that in securing an elective officer in the line of succession the doctrine of separation of powers is violated. The Speaker is a legislative officer, not an executive one. While many critics of the United States government point out the lack of cooperation that exists between the legislative and executive branches, there is no strong desire to make the executive branch subordinate to the legislative. Scanning the appointments made by President Truman, it is noticeable that legislators and ex-legislators are being appointed to high executive offices. Granting that many Presidents have suffered by not cooperating with Congress, it does not follow that legislators, necessarily, make good executives. Usually

the confirmation by the Senate of the appointment of members of Congress to high executive offices has become merely routine. Should a distinguished lawyer be nominated to the Supreme Court or a new member of the National Labor Relations Board be suggested who has never been in Congress, these nominations would at least be scrutinized and receive a casual investigation. But if the persons nominated happen to be members or ex-members of Congress their confirmation usually is made in rapid time, without debate and without investigation. True, the nominee might be well known in the Senate but this does not entirely explain the matter-of-fact Senate approval.

A fourth criticism is that the office of President would benefit more by having Secretaries of State succeed to the presidency than Speakers of the House. At the time little objection was raised to Speaker Rayburn's being next in the line of succession. He ranks high in the esteem of most Americans. Yet, as a whole, the Secretaries of State have throughout our history been more nearly of the calibre that Americans desire for President than have Speakers of the House. G. F. Hoar made this observation in 1886 and called attention to the executive ability of men who have headed the State Department. Recently E. K. Lindley made the same observation. With respect to the Speaker, he says that the fact that he is Speaker "usually means he represents a sure district—which is less likely than a close district to produce a superior man—and that he has not been strong or distinguished enough to run for the Senate or for governor of a state or to be plucked for a cabinet position or even a Federal judgeship." Only one Speaker has ever been elected President, James K. Polk. Henry Clay and James G. Blaine were both nominated but each of these men had served as Secretary of State. On the other hand, it has been customary to appoint distinguished men to head the Department of State. Six have been elected President. Three have served as Chief Justice while six others, besides those elected, have been their party's choice for the presidency.

Although the Supreme Court has never passed upon the question, the different succession acts have been attacked as being unconstitutional. The Sumners act, in the debates in the House, was challenged primarily for that reason. Doubt as to its constitutionality was based first on the ground that any person who succeeds to the presidency must, by the statement in the Constitution, be a civil officer. The Speaker, it was claimed, was not a civil officer in the constitutional sense. Historical precedent was brought forward to prove or disprove this point. The Blount case was used to show that the Speaker is not an "officer," while it was contended on the other side that the act of 1792 implied that the Speaker was an "officer." The second objection raised against its constitutionality is that the Speaker must resign both as Speaker and as a member of the House in order to become President. After this action he is neither an officer of the House nor an "officer" in the constitutional sense and, therefore, cannot succeed to the presidency. The third objection, and this was sustained by the

House, is the matter of holding a special election in the event of the death or disability of the President and Vice President, and the elevation of the Speaker to the office of President. Mr. Robsion of Kentucky offered an amendment to abolish this special election, and it was adopted. This action was due not only to the doubt concerning the constitutionality of this procedure but also to the fact that from a practical viewpoint it was unworkable and undesirable for it would be possible to have four Presidents in four months.

Although this measure has passed the House there is no assurance that it will receive a favorable vote in the Senate. It has many imperfections. Mr. Sumners recognized these faults and expressed the hope that the rough places would be ironed out in conference. Also the appointment of Mr. Byrnes and Mr. Vinson to the Cabinet has restored confidence in the Act of 1886.

In conclusion there appear to be three possible ways of approaching an answer to this problem. The first is to continue in force the Act of 1886. Among others, Senator Taft and Charles Michelson prefer this action. It has its faults but it also has many good points. The second solution is to accept the proposals of President Truman as incorporated in the Sumners bill, and for the Senate to pass the measure or one similar to it. Supporters of this position, and they are many, include most of the members of the House, the President of the United States, and many elder statesmen such as John N. Garner, Alf Landon, and Homer Cummings.

The third mode of procedure is to attack the problem with ample time for thoughtful consideration. Possibly a new act or a constitutional amendment can be prepared that will go a long way toward solving the problem in a manner pleasing to most Americans. Arthur Krock suggests that an acting President be selected by Congress to serve until the next general election, but prefers an amendment to the Constitution stipulating that when a Vice President becomes President an immediate choice of a new Vice President be made. Professor Corwin makes the proposal that "Congress should create forthwith the greatly needed office of Assistant President, one of whose duties should be to 'act as President' whenever that office fell vacant with no Vice President to succeed. Then at the next election for choosing Congressmen, a new President and Vice President should be chosen for 'four years' in the constitutional manner." In conclusion, therefore, while the Sumners act is little or no improvement over the existing law, the matter of presidential succession should not be put aside but should be made the subject of careful thought and deliberate judgment.

80. THE PRESIDENT OF THE UNITED STATES

Personalities must be kept in mind in a study of the office of President as well as in the consideration of other offices. (See reading no. 71, *supra*, with reference to personalities of judges.) In the

following reading,¹ Woodrow Wilson emphasizes his view that the office of President is anything the man in office "has the sagacity and force to make it." Students will be interested in what Wilson says about (a) separation of powers, (b) nominating conventions, (c) leadership, (d) the veto, (e) the part of the President in suggesting legislation, (f) the cabinet, and (g) foreign affairs. Other readings in this volume to which students may want to refer on these points are: (a) no. 10; (b) nos. 51 and 55; (c) no. 52; (d), (e), and (f) no. 53; and (g) no. 105.

It should be kept in mind that Wilson (1856-1924) was writing before he became the twenty-eighth President of the United States. He served as Professor of Jurisprudence and Politics at Princeton University from 1897 to 1910.

By Woodrow Wilson

It is difficult to describe any single part of a great governmental system without describing the whole of it. Governments are living things and operate as organic wholes. Moreover, governments have their natural evolution and are one thing in one age, another in another. The makers of the Constitution constructed the federal government upon a theory of checks and balances which was meant to limit the operation of each part and allow to no single part or organ of it a dominating force; but no government can be successfully conducted upon so mechanical a theory. Leadership and control must be lodged somewhere; the whole art of statesmanship is the art of bringing the several parts of government into effective coöperation for the accomplishment of particular common objects, —and party objects at that. Our study of each part of our federal system, if we are to discover our real government as it lives, must be made to disclose to us its operative coördination as a whole: its places of leadership, its method of action, how it operates, what checks it, what gives it energy and effect. Governments are what politicians make them, and it is easier to write of the President than of the presidency.

The government of the United States was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy of the Newtonian theory of the universe. In our own day, whenever we discuss the structure or development of anything, whether in nature or in society, we consciously or unconsciously follow Mr. Darwin; but before Mr. Darwin, they followed Newton. Some single law, like the law of gravitation, swung each system of thought and gave it its principle of unity. Every sun, every planet, every free body in the spaces of the heavens, the world itself, is kept in its place and reined to its course by the attraction of bodies that swing with equal order and precision about it, themselves governed by the nice poise and balance of forces which give the whole system of the universe its symmetry and perfect adjustment. The Whigs had tried to give England a similar constitution. They had had no wish to destroy the throne, no conscious desire to reduce the king to a mere

¹ Reprinted from Woodrow Wilson, *Constitutional Government in the United States*. Copyright 1908 by Columbia University Press. Used by permission of the Press.

figurehead, but had intended only to surround and offset him with a system of constitutional checks and balances which should regulate his otherwise arbitrary course and make it at least always calculable.

They had made no clear analysis of the matter in their own thoughts ; it has not been the habit of English politicians, or indeed of English-speaking politicians on either side of the water, to be clear theorists. It was left to a Frenchman to point out to the Whigs what they had done. They had striven to make Parliament so influential in the making of laws and so authoritative in the criticism of the king's policy that the king could in no matter have his own way without their coöperation and assent, though they left him free, the while, if he chose, to interpose an absolute veto upon the acts of Parliament. They had striven to secure for the courts of law as great an independence as possible, so that they might be neither overawed by parliament nor coerced by the king. In brief, as Montesquieu pointed out to them in his lucid way, they had sought to balance executive, legislature, and judiciary off against one another by a series of checks and counterpoises, which Newton might readily have recognized as suggestive of the mechanism of the heavens.

The makers of our federal Constitution followed the scheme as they found it expounded in Montesquieu, followed it with genuine scientific enthusiasm. The admirable expositions of the *Federalist* read like thoughtful applications of Montesquieu to the political needs and circumstances of America. They are full of the theory of checks and balances. The President is balanced off against Congress, Congress against the President, and each against the courts. Our statesmen of the earlier generations quoted no one so often as Montesquieu, and they quoted him always as a scientific standard in the field of politics. Politics is turned into mechanics under his touch. The theory of gravitation is supreme.

The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick coöperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. Government is not a body of blind forces ; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common task and purpose. Their coöperation is indispensable, their warfare fatal. There can be no successful government without leadership or without the intimate, almost instinctive, coördination of the organs of life and action. This is not theory, but fact, and displays its force as fact, whatever theories may be thrown across its track. Living political constitutions must be Darwinian in structure and in practice.

Fortunately, the definitions and prescriptions of our constitutional law, though conceived in the Newtonian spirit and upon the Newtonian

principle, are sufficiently broad and elastic to allow for the play of life and circumstance. Though they were Whig theorists, the men who framed the federal Constitution were also practical statesmen with an experienced eye for affairs and a quick practical sagacity in respect of the actual structure of government, and they have given us a thoroughly workable model. If it had in fact been a machine governed by mechanically automatic balances, it would have had no history; but it was not, and its history has been rich with the influences and personalities of the men who have conducted it and made it a living reality. The government of the United States has had a vital and normal organic growth and has proved itself eminently adapted to express the changing temper and purposes of the American people from age to age.

That is the reason why it is easier to write of the President than of the presidency. The presidency has been one thing at one time, another at another, varying with the man who occupied the office and with the circumstances that surrounded him. One account must be given of the office during the period 1789 to 1825, when the government was getting its footing both at home and abroad, struggling for its place among the nations and its full credit among its own people; when English precedents and traditions were strongest; and when the men chosen for the office were men bred to leadership in a way that attracted to them the attention and confidence of the whole country. Another account must be given of it during Jackson's time, when an imperious man, bred not in deliberative assemblies or quiet councils, but in the field and upon a rough frontier, worked his own will upon affairs, with or without formal sanction of law, sustained by a clear undoubting conscience and the love of a people who had grown deeply impatient of the régime he had supplanted. Still another account must be given of it during the years 1836 to 1861, when domestic affairs of many debatable kinds absorbed the country, when Congress necessarily exercised the chief choices of policy, and when the Presidents who followed one another in office lacked the personal force and initiative to make for themselves a leading place in counsel. After that came the Civil War and Mr. Lincoln's unique task and achievement, when the executive seemed for a little while to become by sheer stress of circumstances the whole government, Congress merely voting supplies and assenting to necessary laws, as Parliament did in the time of the Tudors. From 1865 to 1898 domestic questions, legislative matters in respect of which Congress had naturally to make the initial choice, legislative leaders the chief decisions of policy, came once more to the front, and no President except Mr. Cleveland played a leading and decisive part in the quiet drama of our national life. Even Mr. Cleveland may be said to have owed his great rôle in affairs rather to his own native force and the confused politics of the time, than to any opportunity of leadership naturally afforded him by a system which had subordinated so many Presidents before him to Congress. The war with Spain again changed the balance of parts. Foreign questions became leading questions again, as they had been in the first

days of the government, and in them the President was of necessity leader. Our new place in the affairs of the world has since that year of transformation kept him at the front of our government, where our own thoughts and the attention of men everywhere is centred upon him.

Both men and circumstances have created these contrasts in the administration and influence of the office of President. We have all been disciples of Montesquieu, but we have also been practical politicians. Mr. Bagehot once remarked that it was no proof of the excellence of the Constitution of the United States that the Americans had operated it with conspicuous success because the Americans could run any constitution successfully; and, while the compliment is altogether acceptable, it is certainly true that our practical sense is more noticeable than our theoretical consistency, and that, while we were once all constitutional lawyers, we are in these latter days apt to be very impatient of literal and dogmatic interpretations of constitutional principle.

The makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy. His veto upon legislation was only his 'check' on Congress,—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not to be given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action. The constitutional structure of the government has hampered and limited his action in these significant rôles, but it has not prevented it. The influence of the President has varied with the men who have been Presidents and with the circumstances of their times, but the tendency has been unmistakably disclosed, and springs out of the very nature of government itself. It is merely the proof that our government is a living, organic thing, and must, like every other government, work out the close synthesis of active parts which can exist only when leadership is lodged in some one man or group of men. You cannot compound a successful government out of antagonisms. Greatly as the practice and influence of Presidents has varied, there can be no mistaking the fact that we have grown more and more inclined from generation to generation to look to the President as the unifying force in our complex system, the leader both of his party and of the nation. To do so is not inconsistent with the actual provisions of the Constitution; it is only inconsistent with a very mechanical theory of its meaning and intention. The Constitution contains no theories. It is as practical a document as *Magna Carta*.

The rôle of party leader is forced upon the President by the method of his selection. The theory of the makers of the Constitution may have been that the presidential electors would exercise a real choice, but it is hard to understand how, as experienced politicians, they can have expected anything of the kind. They did not provide that the electors should

meet as one body for consultation and make deliberate choice of a President and Vice-President, but that they should meet "in their respective states" and cast their ballots in separate groups, without the possibility of consulting and without the least likelihood of agreeing, unless some such means as have actually been used were employed to suggest and determine their choice beforehand. It was the practice at first to make party nominations for the presidency by congressional caucus. Since the Democratic upheaval of General Jackson's time nominating conventions have taken the place of congressional caucuses; and the choice of Presidents by party conventions has had some very interesting results.

We are apt to think of the choice of nominating conventions as somewhat haphazard. We know, or think that we know, how their action is sometimes determined, and the knowledge makes us very uneasy. We know that there is no debate in nominating conventions, no discussion of the merits of the respective candidates, at which the country can sit as audience and assess the wisdom of the final choice. If there is any talking to be done, aside from the formal addresses of the temporary and permanent chairmen and of those who present the platform and the names of the several aspirants for nomination, the assembly adjourns. The talking that is to decide the result must be done in private committee rooms and behind the closed doors of the headquarters of the several state delegations to the convention. The intervals between sessions are filled with a very feverish activity. Messengers run from one headquarters to another until the small hours of the morning. Conference follows conference in a way that is likely to bring newspaper correspondents to the verge of despair, it being next to impossible to put the rumors together into any coherent story of what is going on. Only at the rooms of the national committee of the party is there any clear knowledge of the situation as a whole; and the excitement of the members of the convention rises from session to session under the sheer pressure of uncertainty. The final majority is compounded no outsider and few members can tell how.

Many influences, too, play upon nominating conventions, which seem mere winds of feeling. They sit in great halls, with galleries into which crowd thousands of spectators from all parts of the country, but chiefly, of course, from the place at which the convention sits, and the feeling of the galleries is transmitted to the floor. The cheers of mere spectators echo the names of popular candidates, and every excitement on the floor is enhanced a hundred fold in the galleries. Sudden gusts of impulse are apt to change the whole feeling of the convention, and offset in a moment the most careful arrangements of managing politicians. It has come to be a commonly accepted opinion that if the Republican convention of 1860 had not met in Chicago, it would have nominated Mr. Seward and not Mr. Lincoln. Mr. Seward was the acknowledged leader of the new party; had been its most telling spokesman; had given its tenets definition and currency. Mr. Lincoln had not been brought within view of the country as a whole until the other day, when he had given Mr. Douglas so hard a fight

to keep his seat in the Senate, and had but just now given currency among thoughtful men to the striking phrases of the searching speeches he had made in debate with his practised antagonist. But the convention met in Illinois, amidst throngs of Mr. Lincoln's ardent friends and advocates. His managers saw to it that the galleries were properly filled with men who would cheer every mention of his name until the hall was shaken. Every influence of the place worked for him and he was chosen.

Thoughtful critics of our political practices have not allowed the excellence of the choice to blind them to the danger of the method. They have known too many examples of what the galleries have done to supplement the efforts of managing politicians to feel safe in the presence of processes which seem rather those of intrigue and impulse than those of sober choice. They can cite instances, moreover, of sudden, unlooked-for excitements on the floor of such bodies which have swept them from the control of all sober influences and hastened them to choices which no truly deliberative assembly could ever have made. There is no training school for Presidents, unless, as some governors have wished, it be looked for in the governorships of states; and nominating conventions have confined themselves in their selections to no class, have demanded of aspirants no particular experience or knowledge of affairs. They have nominated lawyers without political experience, soldiers, editors of newspapers, newspaper correspondents, whom they pleased, without regard to their lack of contact with affairs. It would seem as if their choices were almost matters of chance.

In reality there is much more method, much more definite purpose, much more deliberate choice in the extraordinary process than there seems to be. The leading spirits of the national committee of each party could give an account of the matter which would put a very different face on it and make the methods of nominating conventions seem, for all the undoubted elements of chance there are in them, on the whole very manageable. Moreover, the party that expects to win may be counted on to make a much more conservative and thoughtful selection of a candidate than the party that merely hopes to win. The haphazard selections which seem to discredit the system are generally made by conventions of the party unaccustomed to success. Success brings sober calculation and a sense of responsibility.

And it must be remembered also that our political system is not so coördinated as to supply a training for presidential aspirants or even to make it absolutely necessary that they should have had extended experience in public affairs. Certainly the country has never thought of members of Congress as in any particular degree fitted for the presidency. Even the Vice President is not afforded an opportunity to learn the duties of the office. The men best prepared, no doubt, are those who have been governors of states or members of cabinets. And yet even they are chosen for their respective offices generally by reason of a kind of fitness and availability which does not necessarily argue in them the size and power

that would fit them for the greater office. In our earlier practice cabinet officers were regarded as in the natural line of succession to the presidency. Mr. Jefferson had been in General Washington's cabinet, Mr. Madison in Mr. Jefferson's, Mr. Monroe in Mr. Madison's; and generally it was the Secretary of State who was taken. But those were days when English precedent was strong upon us, when cabinets were expected to be made up of the political leaders of the party in power; and from their ranks subsequent candidates for the presidency were most likely to be selected. The practice, as we look back to it, seems eminently sensible, and we wonder why it should have been so soon departed from and apparently forgotten. We wonder, too, why eminent senators have not sometimes been chosen; why members of the House have so seldom commanded the attention of nominating conventions; why public life has never offered itself in any definite way as a preparation for the presidential office.

If the matter be looked at a little more closely, it will be seen that the office of President, as we have used and developed it, really does not demand actual experience in affairs so much as particular qualities of mind and character which we are at least as likely to find outside the ranks of our public men as within them. What is it that a nominating convention wants in the man it is to present to the country for its suffrages? A man who will be and who will seem to the country in some sort an embodiment of the character and purpose it wishes its government to have,—a man who understands his own day and the needs of the country, and who has the personality and the initiative to enforce his views both upon the people and upon Congress. It may seem an odd way to get such a man. It is even possible that nominating conventions and those who guide them do not realize entirely what it is that they do. But in simple fact the convention picks out a party leader from the body of the nation. Not that it expects its nominee to direct the interior government of the party and to supplant its already accredited and experienced spokesmen in Congress and in its state and national committees; but it does of necessity expect him to represent it before public opinion and to stand before the country as its representative man, as a true type of what the country may expect of the party itself in purpose and principle. It cannot but be led by him in the campaign; if he be elected, it cannot but acquiesce in his leadership of the government itself. What the country will demand of the candidate will be, not that he be an astute politician, skilled and practised in affairs, but that he be a man such as it can trust, in character, in intention, in knowledge of its needs, in perception of the best means by which those needs may be met, in capacity to prevail by reason of his own weight and integrity. Sometimes the country believes in a party, but more often it believes in a man; and conventions have often shown the instinct to perceive which it is that the country needs in a particular presidential year, a mere representative partisan, a military hero, or some one who will genuinely speak for the country itself, whatever be his training and antecedents. It is in this sense

that the President has the rôle of party leader thrust upon him by the very method by which he is chosen.

As legal executive, his constitutional aspect, the President cannot be thought of alone. He cannot execute laws. Their actual daily execution must be taken care of by the several executive departments and by the now innumerable body of federal officials throughout the country. In respect of the strictly executive duties of his office the President may be said to administer the presidency in conjunction with the members of his cabinet, like the chairman of a commission. He is even of necessity much less active in the actual carrying out of the law than are his colleagues and advisers. It is therefore becoming more and more true, as the business of the government becomes more and more complex and extended, that the President is becoming more and more a political and less and less an executive officer. His executive powers are in commission, while his political powers more and more centre and accumulate upon him and are in their very nature personal and inalienable.

Only the larger sort of executive questions are brought to him. Departments which run with easy routine and whose transactions bring few questions of general policy to the surface may proceed with their business for months and even years together without demanding his attention; and no department is in any sense under his direct charge. Cabinet meetings do not discuss detail: they are concerned only with the larger matters of policy or expediency which important business is constantly disclosing. There are no more hours in the President's day than in another man's. If he is indeed the executive, he must act almost entirely by delegation, and is in the hands of his colleagues. He is likely to be praised if things go well, and blamed if they go wrong; but his only real control is of the persons to whom he deposes the performance of executive duties. It is through no fault or neglect of his that the duties apparently assigned to him by the Constitution have come to be his less conspicuous, less important duties, and that duties apparently not assigned to him at all chiefly occupy his time and energy. The one set of duties it has proved practically impossible for him to perform; the other it has proved impossible for him to escape.

He cannot escape being the leader of his party except by incapacity and lack of personal force, because he is at once the choice of the party and of the nation. He is the party nominee, and the only party nominee for whom the whole nation votes. Members of the House and Senate are representatives of localities, are voted for only by sections of voters, or by local bodies of electors like the members of the state legislatures. There is no national party choice except that of President. No one else represents the people as a whole, exercising a national choice; and inasmuch as his strictly executive duties are in fact subordinated, so far at any rate as all detail is concerned, the President represents not so much the party's governing efficiency as its controlling ideals and principles. He is not so much part of its organization as its vital link of connection with the think-

ing nation. He can dominate his party by being spokesman for the real sentiment and purpose of the country, by giving direction to opinion, by giving the country at once the information and the statements of policy which will enable it to form its judgments alike of parties and of men.

For he is also the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him, and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and calibre. Its instinct is for unified action, and it craves a single leader. It is for this reason that it will often prefer to choose a man rather than a party. A President whom it trusts can not only lead it, but form it to his own views.

It is the extraordinary isolation imposed upon the President by our system that makes the character and opportunity of his office so extraordinary. In him are centred both opinion and party. He may stand, if he will, a little outside party and insist as if it were upon the general opinion. It is with the instinctive feeling that it is upon occasion such a man that the country wants that nominating conventions will often nominate men who are not their acknowledged leaders, but only such men as the country would like to see lead both its parties. The President may also, if he will, stand within the party counsels and use the advantage of his power and personal force to control its actual programs. He may be both the leader of his party and the leader of the nation, or he may be one or the other. If he lead the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it.

That is the reason why it has been one thing at one time, another at another. The Presidents who have not made themselves leaders have lived no more truly on that account in the spirit of the Constitution than those whose force has told in the determination of law and policy. No doubt Andrew Jackson overstepped the bounds meant to be set to the authority of his office. It was certainly in direct contravention of the spirit of the Constitution that he should have refused to respect and execute decisions of the Supreme Court of the United States, and no serious student of our history can righteously condone what he did in such matters on the ground that his intentions were upright and his principles pure. But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age. Its prescriptions are clear and we know what they are; a written document makes lawyers of us all, and our duty as citizens should make us conscientious

lawyers, reading the text of the Constitution without subtlety or sophistication; but life is always your last and most authoritative critic.

Some of our Presidents have deliberately held themselves off from using the full power they might legitimately have used, because of conscientious scruples, because they were more theorists than statesmen. They have held the strict literary theory of the Constitution, the Whig theory, the Newtonian theory, and have acted as if they thought that Pennsylvania Avenue should have been even longer than it is; that there should be no intimate communication of any kind between the Capitol and the White House; that the President as a man was no more at liberty to lead the houses of Congress by persuasion than he was at liberty as President to dominate them by authority,—supposing that he had, what he has not, authority enough to dominate them. But the makers of the Constitution were not enacting Whig theory, they were not making laws with the expectation that, not the laws themselves, but their opinions, known by future historians to lie back of them, should govern the constitutional action of the country. They were statesmen, not pedants, and their laws are sufficient to keep us to the paths they set us upon. The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit; and if Congress be overborne by him, it will be no fault of the makers of the Constitution,—it will be from no lack of constitutional powers on its part, but only because the President has the nation behind him, and Congress has not. He has no means of compelling Congress except through public opinion.

That I say he has no means of compelling Congress will show what I mean, and that my meaning has no touch of radicalism or iconoclasm in it. There are illegitimate means by which the President may influence the action of Congress. He may bargain with members, not only with regard to appointments, but also with regard to legislative measures. He may use his local patronage to assist members to get or retain their seats. He may interpose his powerful influence, in one covert way or another, in contests for places in the Senate. He may also overbear Congress by arbitrary acts which ignore the laws or virtually override them. He may even substitute his own orders for acts of Congress which he wants but cannot get. Such things are not only deeply immoral, they are destructive of the fundamental understandings of constitutional government and, therefore, of constitutional government itself. They are sure, moreover, in a country of free public opinion, to bring their own punishment, to destroy both the fame and the power of the man who dares to practise them. No honorable man includes such agencies in a sober exposition of the Constitution or allows himself to think of them when he speaks of the influences of "life" which govern each generation's use and interpretation of that great instrument, our sovereign guide and the object of our deepest reverence. Nothing in a system like ours can be constitutional which is immoral or which touches the good faith of those who have sworn to obey the fundamental law. The reprobation of all good men will always over-

whelm such influences with shame and failure. But the personal force of the President is perfectly constitutional to any extent to which he chooses to exercise it, and it is by the clear logic of our constitutional practice that he has become alike the leader of his party and the leader of the nation.

The political powers of the President are not quite so obvious in their scope and character when we consider his relations with Congress as when we consider his relations to his party and to the nation. They need, therefore, a somewhat more critical examination. Leadership in government naturally belongs to its executive officers, who are daily in contact with practical conditions and exigencies and whose reputations alike for good judgment and for fidelity are at stake much more than are those of the members of the legislative body at every turn of the law's application. The law-making part of the government ought certainly to be very hospitable to the suggestions of the planning and acting part of it. Those Presidents who have felt themselves bound to adhere to the strict literary theory of the Constitution have scrupulously refrained from attempting to determine either the subjects or the character of legislation, except so far as they were obliged to decide for themselves, after Congress had acted, whether they should acquiesce in it or not. And yet the Constitution explicitly authorizes the President to recommend to Congress "such measures as he shall deem necessary and expedient," and it is not necessary to the integrity of even the literary theory of the Constitution to insist that such recommendations should be merely perfunctory. Certainly General Washington did not so regard them, and he stood much nearer the Whig theory than we do. A President's messages to Congress have no more weight or authority than their intrinsic reasonableness and importance give them: but that is their only constitutional limitation. The Constitution certainly does not forbid the President to back them up, as General Washington did, with such personal force and influence as he may possess. Some of our Presidents have felt the need, which unquestionably exists in our system, for some spokesman of the nation as a whole, in matters of legislation no less than in other matters, and have tried to supply Congress with the leadership of suggestion, backed by argument and by iteration and by every legitimate appeal to public opinion. Cabinet officers are shut out from Congress; the President himself has, by custom, no access to its floor; many long-established barriers of precedent, though not of law, hinder him from exercising any direct influence upon its deliberations; and yet he is undoubtedly the only spokesman of the whole people. They have again and again, as often as they were afforded the opportunity, manifested their satisfaction when he has boldly accepted the rôle of leader, to which the peculiar origin and character of his authority entitle him. The Constitution bids him speak, and times of stress and change must more and more thrust upon him the attitude of originator of policies.

His is the vital place of action in the system, whether he accept it as such or not, and the office is the measure of the man,—of his wisdom as well as of his force. His veto abundantly equips him to stay the hand

of Congress when he will. It is seldom possible to pass a measure over his veto, and no President has hesitated to use the veto when his own judgment of the public good was seriously at issue with that of the houses. The veto has never been suffered to fall into even temporary disuse with us. In England it has ceased to exist, with the change in the character of the executive. There has been no veto since Anne's day, because ever since the reign of Anne the laws of England have been originated either by ministers who spoke the king's own will or by ministers whom the king did not dare gainsay; and in our own time the ministers who formulate the laws are themselves the executive of the nation; a veto would be a negative upon their own power. If bills pass of which they disapprove, they resign and give place to the leaders of those who approve them. The framers of the Constitution made in our President a more powerful, because a more isolated, king than the one they were imitating; and because the Constitution gave them their veto in such explicit terms, our Presidents have not hesitated to use it, even when it put their mere individual judgment against that of large majorities in both houses of Congress. And yet in the exercise of the power to suggest legislation, quite as explicitly conferred upon them by the Constitution, some of our Presidents have seemed to have a timid fear that they might offend some law of taste which had become a constitutional principle.

In one sense their messages to Congress have no more authority than the letters of any other citizen would have. Congress can heed or ignore them as it pleases; and there have been periods of our history when presidential messages were utterly without practical significance, perfunctory documents which few persons except the editors of newspapers took the trouble to read. But if the President has personal force and cares to exercise it, there is this tremendous difference between his messages and the views of any other citizen, either outside Congress or in it: that the whole country reads them and feels that the writer speaks with an authority and a responsibility which the people themselves have given him.

The history of our cabinets affords a striking illustration of the progress of the idea that the President is not merely the legal head but also the political leader of the nation. In the earlier days of the government it was customary for the President to fill his cabinet with the recognized leaders of his party. General Washington even tried the experiment which William of Orange tried at the very beginning of the era of cabinet government. He called to his aid the leaders of both political parties, associating Mr. Hamilton with Mr. Jefferson, on the theory that all views must be heard and considered in the conduct of the government. That was the day in which English precedent prevailed, and English cabinets were made up of the chief political characters of the day. But later years have witnessed a marked change in our practice, in this as in many other things. The old tradition was indeed slow in dying out. It persisted with considerable vitality at least until General Garfield's day, and may yet from time to time revive, for many functions of our cabinets

justify it and make it desirable. But our later Presidents have apparently ceased to regard the cabinet as a council of party leaders such as the party they represent would have chosen. They look upon it rather as a body of personal advisers whom the President chooses from the ranks of those whom he personally trusts and prefers to look to for advice. Our recent Presidents have not sought their associates among those whom the fortunes of party contest have brought into prominence and influence, but have called their personal friends and business colleagues to cabinet positions, and men who have given proof of their efficiency in private, not in public, life,—bankers who had never had any place in the formal counsels of the party, eminent lawyers who had held aloof from politics, private secretaries who had shown an unusual sagacity and proficiency in handling public business; as if the President were himself alone the leader of his party, the members of his cabinet only his private advisers, at any rate advisers of his private choice. Mr. Cleveland may be said to have been the first President to make this conception of the cabinet prominent in his choices, and he did not do so until his second administration. Mr. Roosevelt has emphasized the idea.

Upon analysis it seems to mean this: the cabinet is an executive, not a political body. The President cannot himself be the actual executive; he must therefore find, to act in his stead, men of the best legal and business gifts, and depend upon them for the actual administration of the government in all its daily activities. If he seeks political advice of his executive colleagues, he seeks it because he relies upon their natural good sense and experienced judgment, upon their knowledge of the country and its business and social conditions, upon their sagacity as representative citizens of more than usual observation and discretion; not because they are supposed to have had any very intimate contact with politics or to have made a profession of public affairs. He has chosen, not representative politicians, but eminent representative citizens, selecting them rather for their special fitness for the great business posts to which he has assigned them than for their political experience, and looking to them for advice in the actual conduct of the government rather than in the shaping of political policy. They are, in his view, not necessarily political officers at all.

It may with a great deal of plausibility be argued that the Constitution looks upon the President himself in the same way. It does not seem to make him a prime minister or the leader of the nation's counsels. Some Presidents are, therefore, and some are not. It depends upon the man and his gifts. He may be like his cabinet, or he may be more than his cabinet. His office is a mere vantage ground from which he may be sure that effective words of advice and timely efforts at reform will gain telling momentum. He has the ear of the nation as of course, and a great person may use such an advantage greatly. If he use the opportunity, he may take his cabinet into partnership or not, as he pleases; and so its character may vary with his. Self-reliant men will regard their cabinets as executive councils; men less self-reliant or more prudent will regard them as also

political councils, and will wish to call into them men who have earned the confidence of their party. The character of the cabinet may be made a nice index of the theory of the presidential office, as well as of the President's theory of party government; but the one view is, so far as I can see, as constitutional as the other.

One of the greatest of the President's powers I have not yet spoken of at all: his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. The President cannot conclude a treaty with a foreign power without the consent of the Senate, but he may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained. He need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also.

I have not dwelt upon this power of the President, because it has been decisively influential in determining the character and influence of the office at only two periods in our history; at the very first, when the government was young and had so to use its incipient force as to win the respect of the nations into whose family it had thrust itself, and in our own day when the results of the Spanish War, the ownership of distant possessions, and many sharp struggles for foreign trade make it necessary that we should turn our best talents to the task of dealing firmly, wisely, and justly with political and commercial rivals. The President can never again be the mere domestic figure he has been throughout so large a part of our history. The nation has risen to the first rank in power and resources. The other nations of the world look askance upon her, half in envy, half in fear, and wonder with a deep anxiety what she will do with her vast strength. They receive the frank professions of men like Mr. John Hay, whom we wholly trusted, with a grain of salt, and doubt what we were sure of, their truthfulness and sincerity, suspecting a hidden design under every utterance he makes. Our President must always, henceforth, be one of the great powers of the world, whether he act greatly and wisely or not, and the best statesmen we can produce will be needed to fill the office of Secretary of State. We have but begun to see the presidential office in this light; but it is the light which will more and more beat upon it, and more and more determine its character and its effect upon the politics of the nation. We can never hide our President again as a mere domestic officer. We can never again see him the mere executive he was in the thirties and forties. He must stand always at the front of our affairs, and the office will be as big and as influential as the man who occupies it.

How is it possible to sum up the duties and influence of such an office in such a system in comprehensive terms which will cover all its changeful aspects? In the view of the makers of the Constitution the President was to be legal executive; perhaps the leader of the nation; certainly not the

leader of the party, at any rate while in office. But by the operation of forces inherent in the very nature of government he has become all three, and by inevitable consequence the most heavily burdened officer in the world. No other man's day is so full as his, so full of the responsibilities which tax mind and conscience alike and demand an inexhaustible vitality. The mere task of making appointments to office, which the Constitution imposes upon the President, has come near to breaking some of our Presidents down, because it is a never-ending task in a civil service not yet put upon a professional footing, confused with short terms of office, always forming and dissolving. And in proportion as the President ventures to use his opportunity to lead opinion and act as spokesman of the people in affairs the people stand ready to overwhelm him by running to him with every question, great and small. They are as eager to have him settle a literary question as a political; hear him as acquiescently with regard to matters of special expert knowledge as with regard to public affairs, and call upon him to quiet all troubles by his personal intervention. Men of ordinary physique and discretion cannot be Presidents and live, if the strain be not somehow relieved. We shall be obliged always to be picking our chief magistrates from among wise and prudent athletes,—a small class.

The future development of the presidency, therefore, must certainly, one would confidently predict, run along such lines as the President's later relations with his cabinet suggest. General Washington, partly out of unaffected modesty, no doubt, but also out of the sure practical instinct which he possessed in so unusual a degree, set an example which few of his successors seem to have followed in any systematic manner. He made constant and intimate use of his colleagues in every matter that he handled, seeking their assistance and advice by letter when they were at a distance and he could not obtain it in person. It is well known to all close students of our history that his greater state papers, even those which seem in some peculiar and intimate sense his personal utterances, are full of the ideas and the very phrases of the men about him whom he most trusted. His rough drafts came back to him from Mr. Hamilton and Mr. Madison in great part rephrased and rewritten, in many passages reconceived and given a new color. He thought and acted always by the light of counsel, with a will and definite choice of his own, but through the instrumentality of other minds as well as his own. The duties and responsibilities laid upon the President by the Constitution can be changed only by constitutional amendment,—a thing too difficult to attempt except upon some greater necessity than the relief of an overburdened office, even though that office be the greatest in the land; and it is to be doubted whether the deliberate opinion of the country would consent to make of the President a less powerful officer than he is. He can secure his own relief without shirking any real responsibility. Appointments, for example, he can, if he will, make more and more upon the advice and choice of his executive colleagues; every matter of detail not only, but also every

minor matter of counsel or of general policy, he can more and more depend upon his chosen advisers to determine; he need reserve for himself only the larger matters of counsel and that general oversight of the business of the government and of the persons who conduct it which is not possible without intimate daily consultations, indeed, but which is possible without attempting the intolerable burden of direct control. This is, no doubt, the idea of their functions which most Presidents have entertained and which most Presidents suppose themselves to have acted on; but we have reason to believe that most of our Presidents have taken their duties too literally and have attempted the impossible. But we can safely predict that as the multitude of the President's duties increases, as it must with the growth and widening activities of the nation itself, the incumbents of the great office will more and more come to feel that they are administering it in its truest purpose and with greatest effect by regarding themselves as less and less executive officers and more and more directors of affairs and leaders of the nation,—men of counsel and of the sort of action that makes for enlightenment.

81. A VETO MESSAGE

The veto message below is of interest not only as an illustration of the way a President communicates to Congress his refusal to sign a bill which has passed both houses of Congress but also because of President Truman's comments upon the legislative method of attaching a rider to an appropriation bill. As to this method, see the recommendation of the joint committee of Congress, reading no. 87 (item 5), *infra*. The message below is taken from the *Congressional Record*, Volume 92, Part 1. The second and third paragraphs of the message are omitted from the bound edition of the *Record*.

HOUSE OF REPRESENTATIVES

Monday, January 28, 1946

MESSAGE FROM THE PRESIDENT

I am withholding my approval of H. R. 4407, Reducing certain appropriations and contract authorizations available for the fiscal year 1946, and for other purposes.

It is with sincere regret that I am unable to approve this legislation. In response to my communication of September 5, 1945, and in conformity with their own careful plans, the Appropriations Committees of the House and of the Senate held extended hearings and gave mature consideration to the readjustment of executive programs and finances to the problems of the reconversion period. The Congress has acted expeditiously and considerately to develop the basis for the continuing peacetime operations of the Government. It has demonstrated a fine spirit of

economy in reducing appropriations without complicating the delicate adjustment from wartime to peacetime functions, and without sacrificing the basic progress which has been made during the war years in the long-term development of Government activity.

So far as the basic purpose of this bill rescinding appropriations is concerned, I am in thorough agreement with the action of the Congress. Far from wishing to sacrifice the care and effort which have gone into its development, I shall by Executive action preserve the full values of these rescission provisions in the exact terms which the Congress itself has approved. If these provisions stood alone I should gladly approve the bill. I have asked the Director of the Bureau of the Budget to place these rescission amounts in a reserve, nonexpendable status, and so to advise the departments and agencies concerned.

In addition to its effect on appropriations, however, the bill contains provisions which require our system of public employment offices—now unified in a single national system—to be broken up within 100 days, and transferred to operation as 51 separate State and territorial systems.

While I believe such a transfer should be made at the proper time, I am convinced that this bill requires that it be made at the wrong time and in the wrong way. Such a dispersion and transfer at this time would immeasurably retard our reemployment program. And as the basis for Federal-State cooperation, in a fundamental program of national importance, the provisions of the bill dealing with the public-employment offices are unsound and unwise from any point of view.

So far as the timing of the transfer is concerned, the period designated by this bill—the next 100 days—is the most disadvantageous that could have been chosen. It will result in a disrupted and inefficient employment service at the very time when efficient operation is most vitally needed by veterans, workers, and employers.

Our local public employment offices are now, and will be during the next several months, in the midst of the peak work load in their history. This is because the offices are now engaged in counseling and placing millions of applicants who require individualized service. These applicants include able-bodied veterans seeking assistance in their readjustment to civilian life, handicapped veterans requiring even more time and guidance in finding the jobs most suitable for them, and unemployed war workers who are confronted by difficult readjustments because of substantial reductions in job opportunities at their wartime skills and wage rates.

At such a time any change in management and direction is necessarily disruptive to the service. A change which would replace our present single and unified management by 51 separate managements would be very harmful. Even with every effort by the States to promote a smooth transition, the transfer of some 23,000 employees to new conditions of employment, and the adjustment of operations to the requirements of 51 different State agencies, will inevitably cause confusion and delay.

In my reconversion message of September 6 to the Congress I pointed

out our national responsibilities and problems in connection with reemployment during the reconversion period. During this period displaced war workers and the veterans who are returning to civilian life at the rate of more than a million per month will need, and have a right to expect, from their National Government, an effective job-counseling and placement service. These problems and responsibilities cannot, in a period when millions of veterans and other workers are moving across State lines, be met adequately through 51 separate and independent public employment service systems, linked only by the necessarily remote and indirect influence of a Federal agency financing the State systems through grants-in-aid.

For these reasons, I now repeat my recommendation that the transfer of our public employment offices to State operation be postponed until June 1947. The administration is committed to returning the Service to State operation, and that commitment will be carried through. But this is not the time.

Apart from the timing of the transfer, the provisions of H. R. 4407 which govern the basis for Federal-State cooperation in the maintenance of public employment offices do not assure that an adequate service will be available in all States.

The bill provides for the operation of public employment offices by the States under rules and regulations prescribed by the Secretary of Labor to carry out the provisions of the Wagner-Peyser Act. Operating costs would be met entirely by the Federal Government. These provisions of the bill would remain in effect for only a few months—the balance of the current fiscal year.

The bill precludes the granting of funds to any State which is unable, or unwilling, to comply with the provisions of the bill or any requirement of the Secretary of Labor pursuant to the provisions of the bill.

A Federal-State cooperative program for a national system of public-employment offices financed entirely by Federal funds must at least provide assurance as to two basic objectives: The Federal Government must be sure that the essential services are being provided through the States' employment offices, and it must know that the offices are being operated with reasonable efficiency. Under such a program, the Federal Government is not interested in prescribing minute or insignificant details concerning the State operation, but it does have a stake in the preservation of reasonable standards.

H. R. 4407 provides no effective protection for this national interest. If any State, for any reason, cannot or does not meet the minimum requirements, Federal grants cannot be made. But at the same time the Federal Government itself is precluded from continuing the operation of public-employment-office facilities in the State.

This means, in effect, that when there is a substantial failure to provide essential services or to meet minimum standards of efficiency, the Federal Government must choose between two alternatives which are

both unsatisfactory. It must either acquiesce in the substandard operation—or, by withholding funds, it must deprive all of the State's employers, workers, and veterans of a service they need and to which they are entitled.

At a time of such acute emergency—when employment offices are needed to provide veterans with the services with which the Congress has required they be provided, and needed also to assist other unemployed workers in securing peacetime jobs—I cannot approve legislation which, under some conditions, may offer only a choice between a substantially substandard service or no service at all.

It seems clear to me that a matter of such grave importance as our public-employment system deserves not only permanent legislation, but legislation carefully and separately considered. Issues of such a difficult and vital nature should not be dealt with as riders to appropriation bills.

The fact is that our present legislation governing the operation of our cooperative Federal-State employment service system, enacted in 1933, needs thorough revision in the light of changed conditions. Several bills now pending before both Houses of Congress—H. R. 4437, S. 1456, and S. 1510—are designed to accomplish this. Enactment of such permanent legislation is essential before a transfer back to State operation can be achieved in an efficient and orderly manner.

Adequate and uniform standards of service must be maintained and proper security for the personnel of the organization itself must be provided in a permanent way, if it is to keep and attract the caliber of personnel able and eager to perform its important tasks.

Only in this way can we provide a sound and permanent basis for Federal-State cooperation in the maintenance of a postwar system of public employment offices which will meet the needs of veterans, employers, workers, and the Nation as a whole.

While I object to the specific measure which this bill proposes to carry out with respect to our employment service, I object even more strongly to the legislative method employed for its enactment. To attach a legislative rider to an appropriation bill restricts the President's exercise of his functions and is contrary to good government.

In view of my past legislative experience, I realize the obligations of the President to the Congress as a coordinate branch of the Government. At the same time I must be equally aware of the constitutional responsibility of the President to the people, and of the obligation of the Congress to help him discharge that responsibility.

The Constitution has placed upon the President the duty of considering bills for approval or disapproval. It has always been possible for the Congress to hamper the President's exercise of this duty by combining so many subjects into a single bill that he cannot disapprove an objectionable item without holding up necessary legislation.

Partly in order to prevent this practice, it has long been considered a fundamental principle that legislation on a major issue of policy ought not be combined with an appropriation measure. The present bill directly

violates that principle. I am obliged to withhold my approval to some very excellent legislation because of the objectionable practice which has been followed by attaching this rider which I cannot possibly approve.

HARRY S. TRUMAN.

THE WHITE HOUSE, *December 22, 1945.*

82. LIMITS ON POWER OF PRESIDENT

The powers of the presidency are based on provisions of the Constitution. Like all other federal officers and agencies, the President must act within the powers granted him in the Constitution and the laws passed in accordance therewith. Below is an illustration of the way in which the Supreme Court of the United States may check actions of a President which go beyond his lawful powers. (See also the Schechter case, reading no. 69, *supra*.) The following reading is from the opinion of the Supreme Court in the case of *Humphrey's Executor* (Rathbun) v. *United States*, 295 U. S. 602 (1935). Students should note the way in which the court distinguished between the Myers case and the case of *Humphrey's Executor*.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court. Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3 (a), c. 229, 43 Stat. 936, 939; 28 U. S. C. § 288), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming and saying:

"You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign; and on October 7, 1933, the President wrote him:

"Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of \$10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,' restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

The Federal Trade Commission Act, c. 311, 38 Stat. 717; 15 U. S. C. §§ 41, 42, creates a commission of five members to be appointed by the President by and with the advice and consent of the Senate, and § 1 provides:

"Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. . . ."

Section 5 of the act in part provides:

"That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce."

In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to

cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order. If the order is disobeyed, the commission may apply to the appropriate circuit court of appeals for its enforcement. The party subject to the order may seek and obtain a review in the circuit court of appeals in a manner provided by the act.

Section 6, among other things, gives the commission wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters, upon which it must report to Congress with recommendations. Many such investigations have been made, and some have served as the basis of congressional legislation.

Section 7 provides:

"That in any suit in equity brought by or under the direction of the Attorney General as provided in the anti-trust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require."

First. The question first to be considered is whether, by the provisions of § 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. . . .

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Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of § 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is *Myers v. United States*, 272 U. S. 52. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. A like situation was presented in the case of *Cohens v. Virginia*, 6 Wheat. 264, 399, in respect of certain general expressions in the opinion in *Marbury v. Madison*, 1 Cranch 137. Chief Justice Marshall, who delivered the opinion in the *Marbury* case, speaking again for the court in the *Cohens* case, said:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

And he added that these general expressions in the case of *Marbury v. Madison* were to be understood with the limitations put upon them by the opinion in the *Cohens* case. . . .

The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is. Putting aside *dicta*, which may be

followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of “unfair methods of competition”—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams v. United States*, 289 U. S. 553, 565–567), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot

be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, *The Works of James Wilson* (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., § 530, citing No. 48 of the *Federalist*, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see *O'Donoghue v. United States*, *supra*, at pp. 530-531.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial department.

In the light of the question now under consideration, we have re-examined the precedents referred to in the *Myers* case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed from office by the President of the United States" certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the *Myers* case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the *Myers* case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely

of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611-612.

In *Marbury v. Madison*, *supra*, pp. 162, 165-166, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts" and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the "decision of 1789."

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered.

Question No. 1, Yes.

Question No. 2, Yes.

MR. JUSTICE McREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in *Myers v. United States*, 272 U. S. 178, states his views concerning the power of the President to remove appointees.

XIV

National Administration



83. ADMINISTRATIVE REORGANIZATION

Fischer, "Mr. Truman Reorganizes"

84. DECENTRALIZED ADMINISTRATION

Lilienthal, *The TVA: An Experiment*

85. CONGRESS MAY INVESTIGATE ADMINISTRATION

McGrain v. Daugherty

UNDER the New Deal of Franklin D. Roosevelt, many new bureaus and administrative agencies were set up in the central government in order that the resources of the nation might be drawn upon in the solution of pressing economic and social problems. World War II called for an even greater concentration of all the energies of the people of the United States. More federal bureaus and agencies were added. (See introductory note to Chapter XIII.) The need for constant attention to the reorganization of and prevention of inefficiency in national administrative agencies is suggested by readings in this chapter.

NATIONAL ADMINISTRATION



83. ADMINISTRATIVE REORGANIZATION

Difficulties of administrative reorganization and the importance of the personalities involved are indicated in the following reading.¹ It will be noticed that this article was written before Ickes and Wallace resigned their respective cabinet posts and before Vinson was named Chief Justice. For up-to-date information about personnel of government administration and organization of agencies in the federal government, students are referred to the *United States Government Manual* (latest edition), published by the Division of Public Inquiries of the Government Information Service, Bureau of Budget.

The author of this article, John Fischer (b. 1910), worked for the United Press in Europe while a Rhodes Scholar at Oxford. In 1935 he was employed by the Associated Press in Washington, eventually heading its staff covering the Senate. He served with the Department of Agriculture and the Board of Economic Warfare in the government of the United States. He helped organize the BEW economic intelligence staff. In 1946 he went to Russia as one of a team to check on the distribution of UNRRA supplies. In addition to articles in leading magazines, he has written *Why They Behave Like Russians*. He is an editor of *Harper's Magazine*.

MR. TRUMAN REORGANIZES

By John Fischer

For the past seven months the government has been going through a reorganization more drastic and far-reaching than anything since the first upheaval of the New Deal. The shake-up has attracted little public attention, both because it has been smothered by the more spectacular foreign news and because it is being carried out gradually and without uproar. Yet this reorganization probably is the most important accomplishment, so far, of the Truman Administration; and its character will largely determine the Administration's entire future course.

¹ "Mr. Truman Reorganizes" by John Fischer, *Harper's Magazine*, January, 1946. Used by permission.

Mr. Truman stepped into the White House with two firm notions about how the government ought to be run. Both of them grew out of his eagerness to avoid what seemed to him the two great mistakes of his predecessor. He was determined to get along with Congress better than Roosevelt had; and he wanted a "strong" cabinet to which he could delegate a large share of his responsibilities, thus escaping the painfully obvious faults of F. D. R.'s so-called one-man rule.

The new President hoped to solve both problems at once by loading his cabinet with former members of Congress, who presumably would know how to work with their old colleagues on the Hill. Four key Departments—State, Treasury, Agriculture, and Labor—went to such men: Byrnes, Vinson, Anderson, and Schwollenbach. All were long-time personal friends of Truman, and all of them were of proven stature well beyond that of the average legislator.

That was the most Truman could do for the Hill. Two minor Departments, Commerce and Interior, had to be left to New Deal hold-overs, Ickes and Wallace, because—as we shall see—the President simply dared not turn them out. In view of the nervous state of world affairs, it clearly was good politics to keep the military establishment out of politics; so both War and Navy were turned over to career men—Patterson and Forrestal—who had demonstrated their capacity as first-rate administrators. Ancient tradition demanded that the Post Office should go to Truman's campaign manager and political generalissimo, Hannegan, although in fact so many postal jobs recently have been put under Civil Service that it is no longer an important source of patronage. The Justice Department, which *is* a potential fountain of countless favors, went to another political technician, Clark, who is closely allied both to the wealthy oil industry and to the most powerful state delegation in Congress.

In order to strengthen his cabinet still further and to untangle some of the bewildering administrative confusion of Washington, Truman set out to scrap or to bring into the regular departments as many as possible of the ninety-odd "independent" agencies. Most of these—ranging from TVA to the Tariff Commission—are nominally responsible directly to the White House, although it is obviously impossible for any man to supervise a fraction of that number. In practice some of them are responsible to nobody at all.

Consequently, Truman is endeavoring to dismantle or consolidate nearly every such agency, whether wartime or New Deal, which he can reach by means of executive order. Moreover, he has asked Congress for authority to tackle the remaining long-established bureaus and commissions which are protected by statute. (At this writing it seems likely that he will get it, although Congress doubtless will forbid any tampering with a dozen or so of its special pets.) Finally, a thorough remodeling job is either under way or impending in all but three of the regular departments. Taken together, all this piecemeal surgery adds up to a major operation on the framework of government.

Here, in brief outline, is the way the reorganization is working out.

II

THE STATE DEPARTMENT

Three successive secretaries have kept the State Department in an almost continuous turmoil of reorganization ever since the beginning of the war. Yet it remains the most criticized, mistrusted, and ineffectual department of government—and Jimmy Byrnes has yet to prove that he will be any more successful than Hull and Stettinius in his efforts to rejuvenate the imperious old lady.

The nub of this intractable problem lies in the fact that the Department has been dominated for the past thirty-five years by a small clique of Foreign Service officers, who have come to regard it as a sort of private club where they could practice diplomacy as a gentlemanly hobby. Traditionally they entered the service directly from one of the Ivy League universities, without once rubbing elbows with business, labor, or the grubbier facts of American life. From then on both their associations abroad and the traditions of their service have schooled them to think of foreign affairs as the special concern of an aristocracy, like grouse-shooting, and the less the public hears about it the better.

These men are by no means the coterie of vacant-headed tea-sippers sometimes caricatured by their critics. On the contrary, some of them are appallingly clever. They have a mastery of the dark rituals of protocol which a new secretary finds almost indispensable. They are deeply entrenched in the Department's political divisions and key administrative posts. Their own special kind of civil service makes it impossible to root them out; and it also serves as a barrier against any new recruit, however able, who may lack "proper background." Most important of all, they are virtuosos of bureaucratic intrigue. As one of their recent victims complained: "Those boys don't cut your throat like an honest politician. They smile, pat your back, and then stab you in the kidneys with a perfumed ice-pick."

Because they pride themselves on a profound indifference toward economics, the Department's Brahmins have seldom fully understood the tumultuous events of the past three decades. (This same trait, coupled with an open distaste for tradesmen, has not endeared them to American businessmen operating abroad.) Toward other branches of government their attitude ranges from condescension to a thinly-veiled contempt; and as a result the State Department is disliked by nearly everyone else in Washington, and has the most trouble in getting the co-operation of other agencies. Its feud with the Treasury, in particular, has long been an open scandal.

Perhaps the most serious shortcoming of the Foreign Service hierarchy is its failure to develop any interest in the art of administration. On the purely mechanical level, this means that the Department still creaks along

with a set of procedures which might have been inherited from an old ladies' home during the Grant Administration. (In the dispatch of cables, which is its main preoccupation, State is slower than any other major foreign office in the world; and the issuance of a passport may take as long as three months.) On the policy level, it means that each of the political offices habitually makes its own decisions in cozy secrecy with little or no reference to the decisions being made by the next office down the hall. The result, as Walter Lippmann recently pointed out, is that "our foreign relations are not under control, that decisions of the greatest moment are being made in bits and pieces without the exercise of any sufficient overall judgment . . ."

This state of affairs was tolerable in the days when the United States had small concern with the rest of the world, and wanted less. Today, however, it invites catastrophe.

Hence the repeated efforts to do something about it. The venerable Hull, who wasn't much interested in administration himself, simply drew a new set of boxes on the organization chart and shuffled around the old names. Stettinius redrew the boxes again, repainted the fusty corridors, brought in new furniture and a little new blood, and labored heroically to find out why the correspondence so often went unanswered for weeks on end. Meanwhile the old gang conducted business as usual.

When Byrnes took over he seemed bent upon a reorganization that would really take. His first step was to oust the Foreign Service crowd, for the first time in a generation, from two of its key redoubts—the offices of the under secretary and the assistant secretary for administration. Into the first he put Dean Acheson, who suffered many a jab from the perfumed ice-picks during his earlier assignments in the Department and has never forgotten it. For the second, he drafted Colonel Frank McCarthy, a thirty-three-year-old protégé of General George C. Marshall, who had made a reputation as a super-charged administrator while serving as secretary of the General Staff. Byrnes told them to overhaul the works, with the help of a blueprint drawn up by the Budget Bureau, and then took off for Potsdam and the London conference.

McCarthy lasted just six weeks. Full of pep and high purpose, he tore into his job with a somewhat naïve enthusiasm. Gradually it became sodden under a drizzle of cold hostility, passive resistance, time-encrusted precedents, and countless memoranda explaining in three thousand words why nothing really could be done. Moreover, it began to appear doubtful whether Byrnes, an habitual compromiser, would back up the reform program in the face of an ominously growing internal opposition. Then McCarthy developed a painful and quite genuine case of bursitis which afforded a convenient opportunity for him to resign.

To fill the vacancy, at least temporarily, Byrnes called upon his old South Carolina law partner, Donald Russell. His experience has been political rather than administrative, and his most pronounced talent seems to be the smoothing of ruffled feathers. Nobody expects him to attempt any-

thing drastic; the Budget Bureau's reorganization scheme is molding on the shelf; and the old regime is breathing easily again.

Yet in all these abortive reorganizations something has been accomplished. In Byrnes, Acheson, and Ben Cohen, the Department's new counselor, State now has a team of top policy-makers which is sometimes described as the ablest since the days of John Hay. Under great handicaps they are doing their level best to put together a coherent foreign policy, in which the line of action proposed for, say, Japan no longer contradicts that for Eastern Europe, and in which loans to our Allies, tariff revisions, oil interests in Saudi Arabia, overseas airlines, the atom bomb, and a dozen other complex pieces may at last fit together in some consistent pattern.

Their economics staff has been reinforced to a strength of about three hundred, and under the aggressive leadership of Will Clayton it is at last beginning to serve as a counterpoise to the still-dominant political divisions. Byrnes has junked one of Hull's most cherished notions—the theory that the Department should lay down “policy” from its august heights, while lesser agencies carried out “operations”—and has taken over remnants of four such operating agencies, OWI, OSS, the Foreign Economic Administration, and the Office of Inter-American Affairs. It is true that State is not yet in any shape to handle these new functions. At this writing it has not even begun, for example, to recruit and train the large staff of civilian administrators needed to take over the government of Germany from the Army next June. But the mergers at least brought in some desperately needed new blood.

(Whether the best of the new people will stay is another question. Many of them are being shunted into blind-alley jobs, or subjected to systematic hazing. To cite only one instance, Colonel Al McCormick, a former New York lawyer who became one of the Army's most brilliant intelligence officers, was brought into State to organize an urgently needed intelligence and research service. He found himself without adequate budget, staff, or office space, and confronted with the most implacable bureaucratic jealousies. The current betting in Washington is that within six months he will either throw up the job in disgust, or that the intelligence service will be moved outside the Department.)

Another former Army executive, Colonel Carter Burgess, is making slow progress toward the setting up of a modern message center. He has even wangled some cryptographic machines out of the military surplus, to replace the old-fashioned code books which have been technically obsolete for the last decade. Burgess also is expected to sparkplug a new Department secretariat, proposed as a tool for pulling together the operations of many hitherto unco-ordinated offices.

Will these piecemeal reforms ever go far enough to transform the State Department into a really adequate instrument of foreign policy? The tip-off perhaps will be what happens to the Passport Division. For years immemorial it has been run by a dignified gentlewoman named Ruth

Shipley. The Washington legend that she breaks into tears every time anyone actually manages to get out of the country is, no doubt, exaggerated, but apparently needless delay in issuing passports certainly brought gray hairs to the head of every wartime executive who tried to build up a staff abroad, and is still creating widespread resentment. It would be difficult to find anyone in the State Department—even in Mrs. Shipley's own office—who argues that the division operates at maximum efficiency. Yet she is closely allied with the old Foreign Service crowd; there are rumors of political friends on the Hill; and no secretary has quite dared attempt a thorough overhaul. If Byrnes & Co. don't screw up their courage soon to do something about this most obvious sore spot, it is pretty certain that they will never tackle the Department's more fundamental weaknesses.

III

TREASURY

Putting Fred Vinson—"The Judge"—at the head of Treasury may turn out to have been one of the President's most serious administrative blunders. He has exhibited a judgment as firm and lucid as any man in the Administration, and his grasp of the workings of both Congress and the executive agencies is unsurpassed. Consequently, there is a growing opinion in Washington that Vinson might better have been left in his old job of Director of War Mobilization and Reconversion—in effect, Assistant President—which is now being handled with something less than brilliance by one of Truman's old Missouri friends, John Snyder.

Vinson's abilities are not going entirely to waste in the Treasury. He carried most of the load in the British loan negotiations, and for a long time he will have a man-sized task in handling the public debt and easing the tax system back to a peacetime basis. There is little prospect, however, that he will have a chance to operate at full capacity, or that his wisdom will be focused where it is most needed—on the guiding of the country's overall economy.

His is one of the three departments which require no grand-scale reorganization. Its relatively simple operations have been set in an efficient pattern for many years, and the permanent staff is above average quality. Vinson's major change, so far, has been to curtail the foreign activities which his predecessor (with Roosevelt's tacit encouragement) had built up on a considerable scale. The result should be a little less confusion in our diplomatic affairs. Whatever the State Department's shortcomings, they were seldom cured by the kibitzing of Mr. Morgenthau's bright youngsters, and sometimes—as in the case of the unfortunate European Advisory Commission—it caused an embarrassing and costly deadlock.

AGRICULTURE

The appointment of Clinton P. Anderson as Secretary of Agriculture was a sample of Truman's political craftsmanship at its best. Anderson

himself is a farmer, with prosperous—but not too big—properties in both New Mexico and South Dakota. He also is a successful businessman, and he had acquired some useful administrative experience in both state and federal posts in New Mexico. Well-liked by his fellow congressmen, he was identified with neither the extreme New Deal nor conservative wing of the party. Moreover, he had been Congress's most outspoken critic of government farm policy, and as chairman of a committee investigating food shortages he had set forth some vigorous ideas for straightening things out. Truman told him to go right ahead and try—and at the same time he abolished the War Food Administration and handed all its staff and functions to the new secretary.

Anderson's first move was to gather an expert committee to help him plan a top-to-bottom reorganization of the Department. It was headed by Milton Eisenhower, brother of the general and president of Kansas State College; he and most of the members were former Department officials, who knew its intricate machinery but no longer had any personal vested interest in it.

The resulting plan was unexpectedly drastic. It lumped together fourteen loosely-related agencies into one big Production and Marketing Administration, designed to handle all of the Department's major "action programs." The new PMA was set up on commodity lines, so that responsibility for everything concerning cotton, for example, now rests—at least in theory—in one office, instead of being scattered through a dozen different bureaus. A similar consolidation was proposed for the Department's state offices, so that the bewildered farmer would be able to transact his business with the government without the aid of a road map and a triple-decked organization chart.

For his right-hand man, Anderson chose John B. Hutson, a Department officer of nearly twenty years' service, who became both under secretary and chief of the PMA. Most of the other key posts also went to seasoned career men.

In practice, however, the reorganization has not proved quite so neat as the paper pattern. Anderson's shotgun wedding did not end the inherent conflict between the production and marketing sides of the food industry; it merely pushed it out of sight. Beneath the lid of PMA the struggle still goes on, sometimes with paralyzing effects. Together with the normal bureaucratic jealousies, it has made it impossible so far to carry through the amalgamation of the field offices.

For all his capabilities, Hutson has become a badly overworked Pooh-Bah. In addition to his two main jobs, he tries to handle the Commodity Credit Corporation, the Federal Crop Insurance Corporation, and a long list of minor assignments. Inevitably decisions tend to bottleneck on his desk.

Anderson himself looks pretty good in comparison with his two rather feeble predecessors, Claude Wickard and Marvin Jones; but he is showing some of the weaknesses which might be expected of a congressman in a

tough administrative job. Because agriculture is under more rigid government control than any other segment of the economy, he is battered by the fiercest pressures in Washington. A good fellow by both instinct and training, Anderson sometimes is inclined to try to please everybody. Both the liberal Farmers' Union and the conservative Farm Bureau Federation, for example, have conferred with him on successive days—and each came away with the impression that he favored its program.

His real test will come when the postwar farm surpluses begin to pile up and prices start to skid. In order to coax farmers into the utmost wartime production Congress promised to hold prices at a high level at least through 1948—and Anderson has to find some way to carry out this commitment. He will be under terrific pressure to impose rigid production controls, dump surpluses abroad, bribe farmers to plant less, subsidize sales to low-income consumers, murder little pigs, and pack government warehouses. Whatever he does is sure to evoke outraged screams from one or another of the big farm organizations, and probably from consumers, congressmen and taxpayers as well. If Anderson has a plan ready, he has not yet disclosed it. But the decision can't be postponed long. The first big postwar surplus—a glut of eggs—is due to hit the market next spring.

LABOR

The new Secretary of Labor looked like another political natural. Lewis Schwellenbach had been a well-known labor lawyer in Washington state. In the Senate he had chalked up a solid New Deal record which gratified both the CIO and A.F. of L., although he was careful not to become linked to either organization. Later, as a federal district judge, he had demonstrated the kind of even-handed judicial temperament which is supposed to be an asset for a Labor Secretary. The only difficulty was that Schwellenbach didn't want the job.

He knew that a wave of strikes would, as usual, break with the end of the war. And he realized that there was nothing much that any Secretary of Labor could do about it, except to serve as a whipping-boy for management, labor, and the raw-tempered public. It is possible that he accepted, in the end, only because he hopes that this uncomfortable chore may be rewarded eventually by the Supreme Court appointment he has long coveted.

He inherited an organization which had wasted away, during the Roosevelt era, to little more than an agency for collecting statistics and enforcing the child labor laws. Worse yet, the Administration had no clear-cut labor policy, no time to develop one before the strikes started popping, and—once the wartime controls evaporated—no way to enforce whatever policy might be improvised.

In an effort to work out some kind of policy backed by at least moral sanctions, Schwellenbach called the national labor-management conference which at this writing is still in session, and which obviously cannot bring forth any magic recipe for preventing strikes. At least some work

stoppages, however, may be headed off by Schwellenbach's plan to build up the Conciliation Service into the strongest arm of his Department. He has chosen Edgar L. Warren, one of the best of the WLB regional chairmen, to head it. He probably can pick up other labor-wise personnel from the disintegrating WLB, War Manpower Commission, and U. S. Employment Service staffs which the Department took over soon after Schwellenbach's arrival. But his plans for rebuilding the rest of his somewhat seedy and rheumatic bureaus will have to wait until most of the picket lines get back to work.

IV

WAR AND NAVY

The military hair-pulling contest touched off by the proposal to merge the Army and Navy into a single Department of Armed Forces has made that scheme so familiar to most newspaper readers that there is no need to go into its details here. It is curious, however, that through all the noisy controversy there has been almost no public mention of one of the underlying reasons for the Army's enthusiastic support of the plan and the Navy's bull-necked opposition.

Like most Washington squabbles, this one boils down to a question of money. In peacetime, when the services went separately to Congress for their appropriations, the Navy almost always got the big cut. (The theory was that a fleet took decades to build and must be kept in constant readiness, while land and air forces presumably could be improvised in a few months whenever the international weather began to cloud up.) But if Congress decides to ladle all future defense funds into one big pot, the generals are confident that they can grab a bigger helping, and the admirals fear—with reason—that they will get less.

Moreover, the admirals (who often have an almost pathological suspicion of non-naval people) are afraid that on important questions of strategy and administration they would be outvoted two-to-one by the Army and Air Forces men in the combined department. Or, as the Deputy Chief of Naval Operations recently put it, that the merger would "strait-jacket the Navy into the status of an Army auxiliary. . . ."

In addition, the members of the congressional committees now dealing with military affairs view the proposal with a good deal of unspoken apprehension. There are now four such committees, one for each of the services in both House and Senate. A merging of the services themselves would, of course, entail a similar amalgamation of committees—and that would mean that a couple of worthy statesmen would lose their coveted chairmanships, while up to forty members would have to hunt new and probably less influential committee assignments.

Nevertheless, it seems probable that some kind of armed services unification eventually will be agreed upon, simply because the public has come to believe that it will mean economy and an end to Army-Navy

bickering. (Congressional mail is running heavily in its favor.) Top Army politicians are trying to make the bitter dose a little more palatable to the admirals by hinting that they would look on James Forrestal as an acceptable secretary of the combined department. Even on the merits, he probably would be the best possible choice. He has proved himself the strongest Secretary of the Navy in a long time, and politically he is a rare specimen—a Democrat who is also a highly-regarded Wall Street financier. Robert Patterson, an invaluable if somewhat crotchety public servant, then presumably would become under secretary; and General Dwight Eisenhower is, of course, the leading candidate for Chief of Staff of the combined armed forces.

While this issue remains unsettled, no other major question of military policy can be finally resolved. For the present, in fact, there is no such thing as an overall American military policy. Such problems as conscription, the size of the fleet, overseas bases, the rate of aircraft construction, and the future organization of the high command are being debated with little or no relation to each other by the services themselves and by a dozen different congressional committees.

Meanwhile, neither Army or Navy has made any basic organizational adjustment to the advent of atomic warfare, and both services are slipping back into some of their hidebound peacetime habits. For instance, their intelligence operations—today of unprecedented importance—seem to be reverting to the traditional system which General H. H. Arnold described a few weeks ago as “suicidally dangerous.” They are in danger of becoming once more a kind of wastebasket for broken-down cavalry colonels and slow-witted sea captains, merely because neither service has yet devised any other humane way to get rid of its misfits.

COMMERCE AND INTERIOR

Although Truman and Henry Wallace display no overwhelming affection for each other, there was never any question of replacing Wallace as Secretary of Commerce. He had made himself the symbol of the Democratic party’s liberal wing, and his removal might well have alienated the CIO’s Political Action Committee and many thousands of independent voters. Consequently, he was left alone—rather pointedly alone, in fact. No other cabinet member is so studiously ignored by the Administration’s inner political council.

If this cool treatment bothers Wallace, he has never shown any sign of it. He is speaking seldom, avoiding controversy, and concentrating on the long overdue repair of the Commerce Department. The past twelve years had left it in even more ramshackle condition than the Department of Labor. Roosevelt never concealed his jaundiced view of Commerce, which had been Hoover’s pet agency and therefore was presumably infested with Republicans, barricaded behind the protection of Civil Service. Repeatedly he handed to other agencies jobs which logically fell within Commerce’s bailiwick, and he gave it three successive secretaries who

did nothing to haul it out of the doldrums. The first was mild old "Uncle Dan" Roper; the next two were Harry Hopkins, who had more important chores at the White House, and Jesse Jones, who was so preoccupied with his RFC jobs that he seldom set foot in the Commerce offices.

Under these circumstances, the giant Commerce building became a drear, unhappy island amid the bustle of New Deal Washington—and when Wallace's appointment was announced, the morale of many of its officers sank lower still. They expected him to push them aside for a pack of dreamy-eyed New Dealers in search of a last refuge.

He did nothing of the sort. There was no room in the Department's starved budget for more than a handful of new people, and Wallace apparently wanted to use the few appointments at his disposal to reassure the business community which was watching him with such nervous foreboding. To head the Bureau of Standards, for instance, he named Dr. E. U. Condon of the Westinghouse laboratory, a scientist of national repute who obviously harbored no hostility toward industry. Similarly, his choice for Patent Commissioner—an official of unique importance to many corporations—was Casper W. Ooms, a Chicago patent lawyer who had represented such clients as Armour, Bendix, and Sears, Roebuck.

Moreover, Wallace made a point of turning to the old hands in the Department for advice on its internal affairs. (Philip Hauser, assistant director of the census, became his leading brain-truster on reorganization.) With pleased surprise, they found that they at last had a secretary who was interested in their work and took the trouble to learn something about it. They also discovered something which few people, except those who have worked with Wallace, are willing to believe: he is a skilled, hard-driving administrator. (The obvious proof is the fact that he brought the Department of Agriculture to the highest level of efficiency it has ever had, before or since.)

He soon outlined a plan for making Commerce the spokesman for businessmen in the councils of government, and for a field service to provide technical advice for businessmen, just as the county agent system serves farmers. The Bureau of Standards, he suggested, might become a research agency for industries too small to afford their own laboratories, on the model of the agricultural research centers. Wallace also proposed a regrouping of the Department's bureaus—formerly almost autonomous—under three new assistant secretaries, one for foreign trade, another for the industrial economy, and a third especially to help small business.

It is unlikely that those ambitious plans can be completely carried out. They hang upon congressional approval of the additional secretaries, plus a doubling of the present budget. And the coalition of Republicans and Southern Democrats which controls Congress doesn't like Wallace any better than it ever did. Nevertheless, the renovated Department will play a role prominent enough to keep Wallace from dropping out of sight. In the 1946 and 1948 elections his friends expect him to campaign in a score or more of congressional districts, reaffirming his leadership of the

party's hard-pressed liberals. Then, if a serious slump in business and employment occurs at about the turn of the decade, his dormant political career may show surprising signs of life.

Soon after Truman took office the satellites of Ed Pauley—a California oil man who will bear close observation in the months ahead—let it be known that the Interior Department might be an appropriate reward for his spectacular services as the party's treasurer.

At that point Harold Ickes, the self-styled curmudgeon, muttered something about Albert B. Fall, the last Interior secretary who was on intimate terms with the oil industry, and allowed that he had no intention of quitting. And if anybody had ideas about firing him, he intimated, a good deal of fur was likely to fly.

Perhaps Truman never dreamed of such a thing. Certainly Ickes, in spite of his saw-toothed personality, was recognized as one of the most efficient and blatantly honest secretaries the Department has ever enjoyed. Both the President and his political advisers, moreover, were acutely conscious that Ickes commands the most waspish invective in public life, and that anyone who stirs him up always acquires some painful lumps. In any case, Pauley was given the handling of German and Japanese reparations (no doubt with expectations of some more lustrous job in the future) and Ickes was assured that his tenure was safe. Like Wallace, he is being left strictly alone by the rest of the Administration. The Department is arranged about the way he wants it, and no spectacular changes in either organization or personnel are in prospect.

POST OFFICE AND JUSTICE

When a political boss finally rises to the top of his profession and becomes Postmaster General, he nearly always develops a rather touching eagerness to prove to the world (and to himself) that he is a devoted and able public servant. Jim Farley had it; so now has Robert Hannegan. He is devoting an astonishing amount of effort to restoring the war's inroads on the postal service—possibly, as some of his colleagues hint, to the neglect of his political duties. There isn't a great deal, of course, that anyone can do to the staid old Post Office. Hannegan hopes to cut costs a little, speed up deliveries, and perhaps establish a three-cent airmail service, if technical studies indicate that it is feasible.

In the Justice Department, where many of the best jobs are free from civil service, a quiet but far-reaching shift in personnel is under way. Such New Deal veterans as Hugh Cox, Fowler Hamilton, and William McGovern are pulling out, to be replaced by lawyers more closely identified with the regular party organization. Aside from the winding up of some war activities, no structural changes are likely—but the atmosphere of the place under Attorney General Tom Clark is very different from what it was in the days of Francis Biddle. You get the feeling that if it weren't for the building's excellent air-conditioning, every office would be a smoke-filled room.

V

It is becoming apparent that the original strategy of Truman's re-organization was based on at least two serious miscalculations.

For one thing, relations with Congress are not merely a question of personalities, either the President's or those of his cabinet. The present Congress is just as mulishly opposed to Truman's program as it was to Roosevelt's, and it can be moved only by the kind of prod which F. D. R. used so ruthlessly—an appeal directly to the voters. It is little help to the President that at one time or another he has bent elbows or swapped yarns with half the men on the Hill; on the contrary, this very familiarity is probably a handicap. There is hardly a man in Congress—by nature a collection of egoists—who doesn't believe in his heart that he would make a better chief executive than Good Old Harry. He doesn't awe them as Roosevelt did; and in American politics a fearsome respect usually gets results better than camaraderie. By the same token, the fact that his cabinet is generously larded with ex-congressmen is not in itself proving an important asset.

In the second place, Truman is finding that many of his problems cannot be disposed of simply by delegating them to a "strong" cabinet. The really tough ones keep on bouncing back into the White House as the court of last resort. Furthermore, each cabinet officer inevitably becomes the spokesman for a particular interest or economic group, and the President cannot escape the task of reconciling these clashing pressures.

For these reasons, Truman, like every President before him, soon felt the need for some kind of apparatus entirely separate from the cabinet, to help him referee, to seek the truth behind conflicting briefs, to aid him in reaching decisions which would be right for the whole country, rather than for one Department alone. (Here lies the origin of the Kitchen Cabinets and the confidential White House advisers such as Colonel House and Harry Hopkins—phenomena which keep cropping up in American history, to the embarrassment of all tidy political theorists.)

In the beginning, Truman placed his main reliance on Reconversion Director John Snyder. He was armed with authority to lay down policy for every agency dealing with the domestic economy, and to make sure that all their programs meshed together. His office absorbed the vestigial powers of the War Production Board; it drafted presidential messages to Congress; it framed the Administration's legislative program. In theory Snyder was the strongest man in Washington, after the President himself, and on him rested the prime responsibility for steering the country through the perilous transition from war to peace.

Such a task plainly calls for a man of exceptional understanding, firmness, organizing ability, and initiative—a sort of combination of Alexander Hamilton and a more youthful Bernard Baruch. It is no reflection on Snyder to suggest that he has not quite filled the bill; perhaps no man could. At any rate, by November there were many signs that the job

was beginning to overwhelm him, in spite of his almost frantic labors. The excellent staff which he had inherited from Vinson began to drift away in discouragement; before these words reach print, even his deputy, Robert Nathan, probably will be gone.

Under these circumstances, Truman started groping for someone else who might shoulder part of the White House load. He hit upon George Allen, an obscure politician who had traveled with Truman during his last campaign. Allen is a comforting fellow to have around—discreet, jovial, an incomparable teller of ribald stories, tactful about avoiding headachy subjects when the President is tired. Like the Tommy Corcoran of an earlier day, he seemed eager to serve both as a relaxing companion and the White House chore boy. Before long Allen blossomed forth with an office in the State Department building, just across the lane from the executive offices, and the title of personal representative of the President. The errands he runs are infinitely varied, but much of his time has been devoted to dismembering the war agencies and parceling the fragments out to the regular Departments. Occasionally he seems to flourish his scalpel with a somewhat heavy hand; one embittered bureaucrat, whose carefully-drafted reorganization scheme was wrecked by Allen in a ten-minute conversation, refers to him as “that political plumber.”

Finally, during the past few months Truman has been turning more and more to the Budget Bureau for aid in top-level administrative coordination. It is the only arm of the executive which can reach into any unit of government, ask questions, and enforce its findings by the unanswerable method of snapping shut the purse. Its staff is experienced to the point of cynicism in the ways of bureaucracy, and it is managed by two of the country's wisest administrative experts, Harold Smith and Paul Appleby. In all likelihood it can serve the President more effectively than either Snyder or Allen in handling the reins on his cabinet team.

The framework, then, of the Truman reorganization is fairly clear, although the trimming will not be complete for many months. No one—least of all the President—would argue that the structure is perfect. Yet, from a purely administrative standpoint, the result is likely to be a substantial improvement over the Roosevelt regime. The chain of command is more direct, the pattern of authority more clearly defined, the processes of government a little less confused. It may even lead to some minor economies.

It would be a mistake, however, to assume that good administration alone can make Truman a successful President. In the end, that is not the yardstick by which Presidents are measured. Neither Jackson nor Lincoln (nor Roosevelt) was noted for his administrative skill, while that footnote in history, Chester A. Arthur, probably was as good an administrator as ever sat in the White House.

In the years just ahead, as never before, the man at the head of this government will be judged by his handling of a few great issues—the economic crisis just over the horizon, America's new responsibility as the

world's strongest single power, the building of peace. The talent demanded is not that of a tidy bureaucratic housekeeper; it is the unique combination of insight, leadership, and bold judgment which goes to make up a statesman. When the chips were down, Roosevelt nearly always seemed to have it. Perhaps Truman may still prove that he is built on the same scale; he has not proved it yet.

84. DECENTRALIZED ADMINISTRATION

The reading below ¹ is of interest not only because of the importance of the TVA experiment, but also because of the way in which the author points out the grave danger of centralized administration and the possibility of decentralized administration.

The author, David E. Lilienthal (b. 1899), practiced law in Chicago (1923-1931), served as a member of the Wisconsin Public Service Commission (1931), and became a Director of the Tennessee Valley Authority in 1931. He was Chairman of TVA from 1941 to 1946, when he gave up that responsibility to accept the chairmanship of the Atomic Energy Commission.

By David E. Lilienthal

The dilemma of the need for strong central powers and the ineffectiveness of over-centralized administration

So this is our dilemma. Let us concede that if this democracy is to survive and be effective in the world today, its citizens must intrust the federal government with increasingly larger powers to deal with emerging social and economic problems. Only a hopeless antiquarian can ignore the significance of advancements in communication and transportation, the new mobility of our population, and the swift contagion of our once local problems. It is folly to contend today that questions of public health, of child labor, of food supply, are matters for purely local control. State boundaries no longer shelter reasonable economic and social units. Most of the agitation against centralization of authority in the federal government in the name of "States' Rights" is spurious. It comes from those whose selfish economic aspirations require an impotent central government for their fulfillment. And it must be recognized that there is genuine peril if the powers of the federal government are hopelessly outdistanced by the trend to centralized control in industry and commerce and finance. We must have a strong, vital, responsive central government. And yet the dangers of centralized administration are all too evident. They cannot be ignored.

Decentralization in administration proposed as one answer

The remedy for the evils of over-centralization does not lie in limiting the authority of the federal government by refusing to grant it needed

¹ From a printed copy of an address before the Southern Political Science Association, November 10, 1939, at Knoxville, Tennessee, made by David E. Lilienthal, entitled *The TVA: An Experiment in the "Grass Roots" Administration of Federal Functions*. Courtesy of the author.

powers. The answer must be found in improving the methods by which those increasing essential national powers are administered. For I believe it will be discovered that whenever there is honest fear and valid complaint against federal authority, the difficulty lies, not in the grant of power, but in the way in which it is exercised. Those of us who from time to time are most likely to urge the central government to enter new fields of legislation have a grave responsibility to recognize the hazards we invite. We must develop better techniques of public administration or these added powers may themselves destroy the democratic institutions they are inaugurated to improve.

The question simply stated then is this: How can these necessary and long delayed grants of power in the field of economic and social welfare be administered by the federal government so as to avoid the plain dangers and limitations of over-centralized administration? How can a democracy enjoy the advantages of a strong central government and escape the evils of remote, top-heavy central administration of the details of economic life? In my view, the *decentralized administration* of federal functions which lend themselves to such technique, and the *coordination in the field of such decentralized activities* is by all odds the most promising answer.

*Centralized government and centralized administration need not
be synonymous*

Not a few of our difficulties have arisen because we have accepted, uncritically, the notion that centralized administration is an inevitable consequence of a grant of power to the central government. That is simply not true. Yet that is the position commonly accepted, not only by the average citizen, but by writers on political science and administration. Their discussions of the problems of centralization are usually concerned exclusively with how much power should be given to the central government, not how those powers should be translated into action and made part of the daily lives of men.

More acute observers have seen the distinction. About a hundred years ago our institutions were studied at first hand by the French statesman and writer De Tocqueville. No one has ever put the matter more clearly than he. In his famous work, *Democracy in America*, he pointed out the difference between the two in the following language:

"Certain interests are common to all parts of a nation, such as the enactment of its general laws, and the maintenance of its foreign relations. Other interests are peculiar to certain parts of the nation; such, for instance, as the business of the several townships. When the power which directs the former or general interests is concentrated in one place or in the same persons, it constitutes a centralized government. To concentrate in like manner into one place the direction of the latter or local interests, constitutes what may be termed a centralized administration."²

² Alexis De Tocqueville, *Democracy in America*, translated by Henry Reeve, Esq., and translation revised by Francis Bowen. (Boston: John Allyn, Publisher, 1876), 6th edition, vol. 1, p. 108.

This difference between *governmental centralization* and *administrative centralization* is fundamental. Governmental centralization in this sense will inevitably continue. Probably it will increase. Administrative centralization, on the other hand, has recognized hazards, and I believe the trend must be reversed without delay. I venture to suggest that unless administrative centralization is inhibited, a reaction against further central powers, essential to a functioning democracy, will inevitably follow. De Tocqueville's conclusions are significant and should be heeded. He said:

"... Indeed, I cannot conceive that a nation can live and prosper without a powerful centralization of government. But I am of opinion that a centralized administration is fit only to enervate the nations in which it exists, by incessantly diminishing their local spirit. Although such an administration can bring together at a given moment, on a given point, all the disposable resources of a people, it injures the renewal of those resources. It may insure a victory in the hour of strife, but it gradually relaxes the sinews of strength. It may help admirably the transient greatness of a man, but not the durable prosperity of a nation."³

The TVA as an experiment in decentralization

Learning how to decentralize the administration of centralized authority cannot be achieved by abstract thinking. Experimentation is required. Methods must be tried out, improved here, abandoned there. There has been some of that experimentation in the past, notably in the administration of some of the grants-in-aid to the states. The penetrating insight of the late Grace Abbott in her administration of the first federal child labor law, and later the Maternity and Infancy Act, is an illustration. In Washington today experimentation in decentralization is a continuing subject of interest to able and resourceful public servants. Many of these efforts, however, are limited at the outset by statutes which hamper genuine progress, since they require centralization in extreme and often unworkable forms.

It is of one contemporary experiment I wish to speak—the Tennessee Valley Authority—the boldest and perhaps most far-reaching effort of our times to decentralize the administration of federal functions. If it succeeds, if its methods prove to be sound, we shall have added strength to the administrative defenses which protect the future of our beleaguered democracy.

The powers of the TVA are, of course, national powers. The seven-state watershed drained by a single river system presents a variety of problems with which the separate states and localities acting alone are unable to deal. Obviously the control and conservation of the water resources of a great river system, to serve alike the needs for flood control, navigation, and water power, are tasks which only the federal government, with its broad powers, is in a position to undertake. If this job was to be done in the Tennessee Valley, a federal agency or agencies had to do it.

³ *Ibid.*, p. 109.

So the TVA was inaugurated. In some respects the powers granted in its organic act represent a genuine extension of federal activity. In other aspects of its varied program its functions had long been responsibilities of existing federal agencies. The novel feature of its charter was the *unity* with which these varied problems of a watershed and its people were conceived. For the first time a President and Congress viewed the problems of a region as Maitland saw "the unity of all history": as a "seamless web"; one strand cannot be torn without affecting every other strand. The problems of a region were viewed as a *single problem* of many integrated parts, rather than dissected into separate bits in order to fit the pigeon-holes of existing governmental instrumentalities. This thesis of integration led Congress to vest no single function of the federal government in the TVA, but rather substantially all of the federal interests in the region as they related to the control of natural resources of water and land.

The area of its operation, based upon geographic and economic realities rather than political boundaries, encouraged a decentralized administration. But most significant, perhaps, is the fact that the Authority was given the autonomy which guaranteed its flexibility. It was created in the form of a corporation, and the charter of this corporation grants broad, flexible, discretionary powers. The message of the President recommending its creation, and the report of the Conference Committee adopted when the legislation was enacted, both emphasize the need for an agency of government enjoying such flexibility and permitting the exercise of initiative and mobility. The TVA was not made part of an existing federal department. It was not made a federal bureau, but rather created as an independent agency, continuously coordinated with national policies through its explicit responsibilities to the President and to Congress. The TVA statute was designed to permit the Authority to make its decisions in the field, close to the people and their problems, where adjustments and modifications adapting the federal program to meet local situations are more readily developed. That power to decide in the field is, I believe, the heart of any decentralized program, the quality without which there can never be a genuine federal administration at the "grass roots."

The "grass roots" administration in action

For six years now the TVA has been making a conscious effort to push its administration farther down into the "grass roots." It takes time. We are not always successful by any means. But that is our objective, and we will persist in working toward it. I should like to describe in some detail a few of the methods presently in use so that there may be no doubt as to what we mean by "decentralization" on a regional basis, for it is important to clear thinking that we define our terms. And let me make it clear that TVA does not claim that all its techniques are original. We have adopted many methods used by other public and private agencies. We have also done some pioneering. We have had an unusual opportunity to make head-

way largely because the TVA Act promotes and indeed requires decentralization, whereas most other federal legislation in fields at all comparable either ignores or actually prevents genuine decentralization. Our unique contribution has been that both by tested means and by newly adopted practices we have been consciously and deliberately striving to discover just how far and how effectively a federal program can be decentralized in its administration.

We have set out to reach certain administrative goals. The TVA Board of Directors believes now that out of our experience we can offer these goals as *the essential characteristics of a decentralized administration of federal functions*.

1. A decentralized administration is one in which the greatest number of decisions is made in the field. Therefore the field officers must be selected, trained, and supervised with a view to increasing their capacity to decide questions on the ground. They must be able to understand the broad, general policies, and to adapt them to varying local situations. An over-centralized administration, in public or private business, is always characterized by the fact that its field officers tend to become messengers and errand boys. Talent, recognition, and remuneration stay at the center where responsibility is concentrated. Administration can never be decentralized that way.

2. A decentralized federal administration must develop as far as possible the active participation of the people themselves. It must utilize the services of state and local agencies, supplementing and stimulating, not duplicating, their staff or equipment. The federal government must give leadership, but its job should be to encourage the participation of local agencies in establishing basic national standards. It cannot be content with compliance.

3. A decentralized federal administration must coordinate in the field the work of state and local governments, aiming toward common objectives. The statute of the TVA encourages it likewise to coordinate and to integrate other federal agencies operating in the area. In highly centralized administrations the coordination is at the top. Delays result, jealousies develop, jurisdictional disputes are magnified. In a decentralized administration the coordination must be in the field.⁴

These three objectives, in TVA's experience, become the distinguishing goals of a decentralized administration. They must exist whether the area of operation is small or large, because although a limited area is necessary to make a decentralized administration possible, it is not in itself a guarantee. The affairs of a state, a town, even a household may be afflicted with a dangerously centralized administration.

⁴ See Marshall E. Dimock, "Executive Responsibility," 3 *Society for Advancement of Management Journal*, 22, 27. Jan., 1938.

*TVA's agricultural program as an illustration of
"grass roots" administration*

Let me describe, by way of illustration, the way in which our agricultural program has developed, using methods characterized by the administrative objectives I have listed. The Authority inherited a war-time factory at Muscle Shoals which it was directed to use for experimentation in the production of plant foods to conserve the nation's exhausted soil. We were further directed to conduct demonstrations on the soil in the use of the fertilizer thus produced, and to engage in a program of soil conservation. On the advice of experts it was decided to devote the plant to the production of new and more efficient forms of phosphatic fertilizer. As soon as our laboratories produced the new material in sufficient quantities for testing purposes, written agreements were executed with the *agricultural experiment stations* associated with the land grant colleges in each of the seven Valley states, all local institutions of long standing and familiarity with local conditions. Each experiment station agreed to test the new types of plant foods under conditions of scientific control and observation. For this purpose, the TVA did not set up its own testing equipment, nor develop a huge staff. We used local facilities already in existence. And when the tests yielded adequate technical data, a program was developed to test and demonstrate the new products under practical farming conditions. To accomplish this result TVA made agreements with the *agricultural extension services* of the same land grant colleges. So, in a steady march toward the "grass roots," the TVA began its program of cooperation with the farmers themselves. This is the way that testing is being done in the field today.

The county agricultural agent, himself a combination federal, state, and local official, calls together the farmers of the community and explains the testing program, and its relation to soil fertility and rural conservation. The farmers themselves then select the farm of one of their neighbors to be used as a demonstration unit. The selected farm is mapped and inventoried, and the necessary changes in his farm management are made by the farmer-operator with the advice and assistance of a local committee of his neighbors, the county agent, and if necessary the college itself. The farmer agrees to carry out the program, to keep the necessary records, to report the results, and to pay the transportation costs of the phosphatic fertilizer the Authority contributes.

Each test-demonstration farm becomes a community enterprise. Neighboring farmers visit the test farm and watch the results; sometimes as many as a hundred farmers and their families join in a single area-wide enterprise. A meeting of one of these communities is a refreshing experience for anyone who is oppressed with the sterility of some types of "expert" activity and stodgy "reports"; or to those who despair of the reserves of vitality of the democratic process.

On September 1, 1939, after six years, there were 26,532 farms in 20

states cooperating in this demonstration program. Each farm was the center of a group of participating farmers varying from 15 to 125; a total of about three quarters of a million farmers actively engaged, in their own neighborhoods, in carrying out a national program. There were 4,290,007 acres of land in 20 states under a controlled program of soil conservation under community auspices. *Every one of those demonstrations was planned, organized, conducted, and, to a large extent, financed by the farmers in the community.* The Extension Service provides information and leadership in setting up the organization and supervising the record-keeping. The TVA provides the plan of procedure, the fertilizer materials, and funds for assistance in organization and supervision. But there is no imposing of regulations designed in some remote headquarters. Perhaps it is fortunate that although the TVA has large authority it has, in this field, no *powers* in the political sense. We cannot compel compliance with any of these plans. There is no penalty for non-cooperation. The contracts between the federal government and groups of its citizens are voluntarily entered into. The Authority has a minimum temptation to be arbitrary. We must cherish this participation of the people if our program of rural rebuilding is to go forward.

*How special problems can be diagnosed and remedied by
the "grass roots" technique*

It must be remembered that the hard problem in any soil conservation program is its application in the field. Experts know now how to restore and conserve the fertility of the worn out land. Time and money will do it on millions of acres. If, as fortunately is not the case, the government owned all the land, it would be easy. The point is that conservation must be carried on on lands owned by individual farmers, who are using the land to make a living, often a precarious living. At a distance it is too easy to forget that a farmer who joins a national program of soil rebuilding is asked to forego a part of his cash income when he sows his land to cover crops for a season. For the farmer whose family must be fed and educated on a slender margin, this may mean a major dislocation of his personal budget. He may be eager to join for the good of his community and his country, but the problem he faces is how to increase the revenues on a part of his land so he can protect the soil on the rest.

The TVA set out to do something about this problem of fitting a general program to individual needs, of making self-interest and national interest in soil preservation more nearly synonymous. Some way had to be found to help the individual farmer to raise his income on the land it was wise for him to use for production.

The men on the ground, technicians or laymen, can see these individual problems most clearly and be of most use in solving them. A decentralized grass-roots structure of program is in a position to receive plans and recommendations from the field. Such specific recommendations were

made to TVA and were promptly accepted. We early learned from the field, for example, that the soil conserving program could never be widely adopted in the South unless new and cheap farm equipment were designed, unless in other specific ways methods to raise farm income were discovered and demonstrated. TVA's budget was not big enough to do that whole job, nor was it desirable for the Authority to duplicate facilities and staffs already assembled by other agencies. Another set of voluntary agreements was negotiated. These experiments in practical methods of agricultural readjustment have been undertaken under a Memorandum of Understanding between the United States Department of Agriculture, the TVA, and the state agricultural colleges, and under separate contracts with the engineering colleges of the Valley states. Additional agreements have been made with groups of citizens, and with industry. I want to mention a few examples of what has been done.

All the experts agreed that the planting of small grains on hillside *lespedeza* sod was desirable to help prevent erosion from winter rains, to keep the valuable nitrogen in the *lespedeza* roots from leaching, and to furnish an extra crop. But the equipment available at the hardware store in town was too costly for low-income farms and it took too much of the farmer's time to operate. So our technicians designed new equipment. A furrow seeder to be attached to a two-horse plow was developed. It plows furrows along the contours of the slope so as to hold water and prevent washing, and drops the seed and phosphate fertilizer in the furrow, all in one operation. It was given practical tests and demonstrations on farms in fifty counties of the Valley by the Extension Service and its county agents. Manufacturers of farm equipment were interested, and now one of them has begun to manufacture the furrow seeder under an arrangement with the Authority open to all manufacturers. Its cost is less than twenty-five dollars, and sales to farmers in eight states are already reported. This may sound prosaic to some, but as a consequence one adjustment in the local application of a federal program has been made, in one more way self-interest has been identified with national interest.

While one group worked on farm equipment, another experimented in ways to encourage the planting of soil conserving crops by demonstrating their value as income producers. As one result, last year approximately 88,000 pounds of strawberries and 20,000 pounds of youngberries were quick-frozen in an experimental plant by a new and remarkable process invented and developed by the TVA and one of the state university engineering schools. The berries were sold at premium prices, largely in metropolitan areas. They were delivered after an icy journey down the Tennessee in a refrigerated barge designed for the purpose. In the years before these experiments were undertaken more than 20 per cent of this crop was frequently lost. The berries were dumped on the market to spoil or sell below cost. The same freezing process has now been successfully applied to all sorts of vegetables, fruits and meats. It may revolutionize farm marketing, when the equipment goes into general commercial use.

No government can properly ask its citizens to gamble with their scant resources by planting a crop of uncertain returns, no matter how much the public interest in saving soil may be at stake. But with the success of such an experiment as the quick-freezing venture the farmer is not afraid to plant more acres to these soil conserving crops. He can put into practice the soil conserving techniques that science has produced and the federal government has brought to his door, without thereby risking his family's livelihood.

Another example: Last year in Clarkesville, Georgia, 61 families stored 16,000 pounds of meat and other perishable farm products in a community refrigerator. It was one of eleven demonstration projects scattered throughout the Tennessee Valley, serving in all more than 250 families. Rural refrigeration was almost unknown in this area until TVA's research demonstrated that a community "cooler" could be constructed for a few hundred dollars, and TVA electricity rates made its operation possible at a cost of less than fifty dollars for a year. They are installed at cross-roads stores today, or on convenient farms, and the saving of one of them last year was estimated to be nearly \$500. Losses from spoilage were reduced, and the hazards of unfavorable marketing minimized. There was an increase in fresh meats for home consumption. The income of the participating farmers went up a little. More farmers were thereby encouraged to come into the program of soil rebuilding.

These are simply examples to show you what we mean in TVA when we talk about methods of decentralization. We mean a program administered so near the grass roots that it is possible to see promptly each lag between general regulations and individual application, between national welfare and self-interest. I could multiply the examples, and tell you about the experiments in the processing of sorghum, sweet potatoes, and cotton seed meal, about the development of electric hay driers, seed harvesters, seeders, threshers, feed grinders, brooders, and the like. Every one of them has one purpose—by raising his income to enable the farmer to participate in a national program essential to the future well-being of this democracy. As students of public administration I ask you to recall that the need for every one of these projects was discovered by public servants on duty in the field.

So far as it is possible at this stage to judge the results of a long-time campaign such as a rural conservation program must necessarily be, we believe our methods are getting results. The people affected are participating to a remarkable degree. We are using to the fullest extent existing agencies of all kinds; our practices are being adapted and modified to meet local conditions. Decisions are made in the field by a staff chosen and trained for that responsibility. It is decentralization in fact. The future must be the judge of whether those methods are effective to do a federal job. We believe they are.

85. CONGRESS MAY INVESTIGATE ADMINISTRATION

The power of Congress to check on administrative agencies has been upheld by the Supreme Court of the United States, as will be seen in the following excerpt from the opinion of the court in *McGrain v. Daugherty*, 273 U. S. 135 (1927).

MR. JUSTICE VAN DEVANTER delivered the opinion of the court . . .

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We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. The acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it “more effectually” than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative

function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

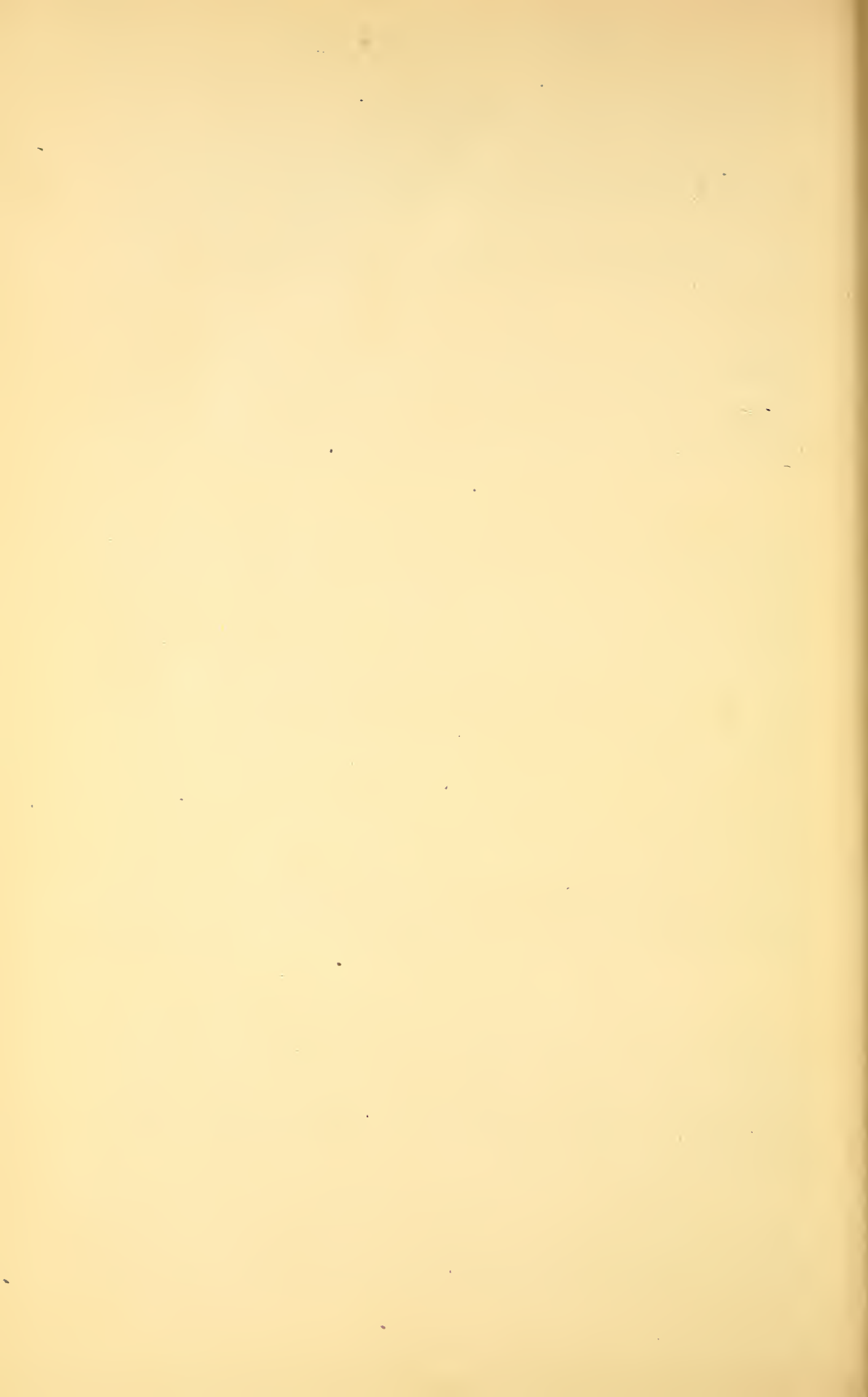
The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson* and *Marshall v. Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

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It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

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We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment.



XV

Governmental Finance;
Monetary Control



86. POWER TO TAX
Steward Machine Co. v. Davis
87. "STRENGTHENING FISCAL CONTROL"
Senate Report No. 1011
88. "INTERGOVERNMENTAL FISCAL RELATIONS"
Senate Document No. 69
89. A TAX PROGRAM
The Committee on Postwar Tax Policy
90. MONETARY CONTROL
Warburton, "Monetary Control Under the
Federal Reserve Act"
91. POWER TO DETERMINE MONETARY POLICY
Norman v. Baltimore & Ohio Railroad Co.
92. REGULATION OF CURRENCY, A SOVEREIGN
POWER
Perry v. United States

THE executive branch of the government has much to do with governmental finance. However, the problem of financing government is one which is closely interwoven in the lives of individuals and in the operation of all branches of local, state, and federal (national) government. Readings in this chapter suggest the importance of the powers of Congress as to taxation and control of the currency, and also the need for improvement in fiscal control, in tax policy, and in inter-governmental fiscal relations.

GOVERNMENTAL FINANCE; MONETARY CONTROL



86. POWER TO TAX

The following excerpt is from the opinion of the Supreme Court of the United States in the case of *Steward Machine Co. v. Davis, Collector of Internal Revenue*, 301 U. S. 548 (1937). Other cases involving taxation include *Graves v. New York* (reading no. 33, *supra*) and *M'Culloch v. Maryland* (reading no. 68, *supra*).

STEWARD MACHINE CO. v. DAVIS, COLLECTOR OF INTERNAL REVENUE

MR. JUSTICE CARDOZO delivered the opinion of the Court.

The validity of the tax imposed by the Social Security Act on employers of eight or more is here to be determined.

Petitioner, an Alabama corporation, paid a tax in accordance with the statute, filed a claim for refund with the Commissioner of Internal Revenue, and sued to recover the payment (\$46.14), asserting a conflict between the statute and the Constitution of the United States. Upon demurrer the District Court gave judgment for the defendant dismissing the complaint, and the Circuit Court of Appeals for the Fifth Circuit affirmed. 89 F. (2d) 207. . . . An important question of constitutional law being involved, we granted certiorari.

The Social Security Act (Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U. S. C., c. 7 (Supp.)) is divided into eleven separate titles, of which only Titles IX and III are so related to this case as to stand in need of summary.

The caption of Title IX is "Tax on Employers of Eight or More." Every employer (with stated exceptions) is to pay for each calendar year "an excise tax, with respect to having individuals in his employ," the tax to be measured by prescribed percentages of the total wages payable by the employer during the calendar year with respect to such employment. § 901. One is not, however, an "employer" within the meaning of the act unless he employs eight persons or more. § 907 (a). There are also other limitations of minor importance. The term "employment" too has its special definition, excluding agricultural labor, domestic service in a private

home and some other smaller classes. § 907 (c). The tax begins with the year 1936, and is payable for the first time on January 31, 1937. During the calendar year 1936 the rate is to be one per cent, during 1937 two per cent, and three per cent thereafter. The proceeds, when collected, go into the Treasury of the United States like internal-revenue collections generally. § 905 (a). They are not earmarked in any way. In certain circumstances, however, credits are allowable. § 902. If the taxpayer has made contributions to an unemployment fund under a state law, he may credit such contributions against the federal tax, provided, however, that the total credit allowed to any taxpayer shall not exceed 90 per centum of the tax against which it is credited, and provided also that the state law shall have been certified to the Secretary of the Treasury by the Social Security Board as satisfying certain minimum criteria. § 902. . . . Some of the conditions thus attached to the allowance of a credit are designed to give assurance that the state unemployment compensation law shall be one in substance as well as name. Others are designed to give assurance that the contributions shall be protected against loss after payment to the state. To this last end there are provisions that before a state law shall have the approval of the Board it must direct that the contributions to the state fund be paid over immediately to the Secretary of the Treasury to the credit of the "Unemployment Trust Fund." . . . For the moment it is enough to say that the Fund is to be held by the Secretary of the Treasury, who is to invest in government securities any portion not required in his judgment to meet current withdrawals. He is authorized and directed to pay out of the Fund to any competent state agency such sums as it may duly requisition from the amount standing to its credit. § 904 (f).

Title III, which is also challenged as invalid, has the caption "Grants to States for Unemployment Compensation Administration." Under this title, certain sums of money are "authorized to be appropriated" for the purpose of assisting the states in the administration of their unemployment compensation laws, the maximum for the fiscal year ending June 30, 1936 to be \$4,000,000, and \$49,000,000 for each fiscal year thereafter. § 301. No present appropriation is made to the extent of a single dollar. All that the title does is to authorize future appropriations. Actually only \$2,250,000 of the \$4,000,000 authorized was appropriated for 1936 (Act of Feb. 11, 1936, c. 49, 49 Stat. 1109, 1113) and only \$29,000,000 of the \$49,000,000 authorized for the following year. Act of June 22, 1936, c. 689, 49 Stat. 1597, 1605. The appropriations when made were not specifically out of the proceeds of the employment tax, but out of any moneys in the Treasury. Other sections of the title prescribe the method by which the payments are to be made to the state (§ 302) and also certain conditions to be established to the satisfaction of the Social Security Board before certifying the propriety of a payment to the Secretary of the Treasury. § 303. They are designed to give assurance to the Federal Government that the moneys granted by it will not be expended for purposes alien to

the grant, and will be used in the administration of genuine unemployment compensation laws.

The assault on the statute proceeds on an extended front. Its assailants take the ground that the tax is not an excise; that it is not uniform throughout the United States as excises are required to be; that its exceptions are so many and arbitrary as to violate the Fifth Amendment; that its purpose was not revenue, but an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender.

The objections will be considered seriatim with such further explanation as may be necessary to make their meaning clear.

First. The tax, which is described in the statute as an excise, is laid with uniformity throughout the United States as a duty, an impost or an excise upon the relation of employment.

1. We are told that the relation of employment is one so essential to the pursuit of happiness that it may not be burdened with a tax. Appeal is made to history. From the precedents of colonial days we are supplied with illustrations of excises common in the colonies. They are said to have been bound up with the enjoyment of particular commodities. Appeal is also made to principle or the analysis of concepts. An excise, we are told, imports a tax upon a privilege; employment, it is said, is a right, not a privilege, from which it follows that employment is not subject to an excise. Neither the one appeal nor the other leads to the desired goal.

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The historical prop failing, the prop or fancied prop of principle remains. We learn that employment for lawful gain is a "natural" or "inherent" or "inalienable" right, and not a "privilege" at all. But natural rights, so called, are as much subject to taxation as rights of less importance. An excise is not limited to vocations or activities that may be prohibited altogether. It is not limited to those that are the outcome of a franchise. It extends to vocations or activities pursued as of common right. What the individual does in the operation of a business is amenable to taxation just as much as what he owns, at all events if the classification is not tyrannical or arbitrary. "Business is as legitimate an object of the taxing powers as property." . . .

The subject matter of taxation open to the power of the Congress is as comprehensive as that open to the power of the states, though the method of apportionment may at times be different. "The Congress shall have power to lay and collect taxes, duties, imposts and excises." Art. 1, § 8. If the tax is a direct one, it shall be apportioned according to the census or enumeration. If it is a duty, impost, or excise, it shall be uniform throughout the United States. Together, these classes include every form of tax appropriate to sovereignty. . . . The statute books of the states are strewn with illustrations of taxes laid on occupations pursued of com-

mon right. We find no basis for a holding that the power in that regard which belongs by accepted practice to the legislatures of the states, has been denied by the Constitution to the Congress of the nation.

2. The tax being an excise, its imposition must conform to the canon of uniformity. There has been no departure from this requirement. According to the settled doctrine the uniformity exacted is geographical, not intrinsic. *Knowlton v. Moore, supra*, p. 83; . . .

Second. The excise is not invalid under the provisions of the Fifth Amendment by force of its exemptions.

The statute does not apply, as we have seen, to employers of less than eight. It does not apply to agricultural labor, or domestic service in a private home or to some other classes of less importance. Petitioner contends that the effect of these restrictions is an arbitrary discrimination vitiating the tax.

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The classifications and exemptions directed by the statute now in controversy have support in considerations of policy and practical convenience that cannot be condemned as arbitrary. The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. . . . The act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.

Third. The excise is not void as involving the coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government.

The proceeds of the excise when collected are paid into the Treasury at Washington, and thereafter are subject to appropriation like public moneys generally. *Cincinnati Soap Co. v. United States, ante*, p. 308. No presumption can be indulged that they will be misapplied or wasted. Even if they were collected in the hope or expectation that some other and collateral good would be furthered as an incident, that without more would not make the act invalid. *Sonzinsky v. United States*, 300 U. S. 506. This indeed is hardly questioned. The case for the petitioner is built on the contention that here an ulterior aim is wrought into the very structure of the act, and what is even more important that the aim is not only ulterior, but essentially unlawful. In particular, the 90 per cent credit is relied upon as supporting that conclusion. But before the statute succumbs to an assault upon these lines, two propositions must be made out by the assailant. *Cincinnati Soap Co. v. United States, supra*. There must be a showing in the first place that separated from the credit the revenue provisions are incapable of standing by themselves. There must be a showing in the second place that the tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states. The truth

of each proposition being essential to the success of the assault, we pass for convenience to a consideration of the second, without pausing to inquire whether there has been a demonstration of the first.

To draw the line intelligently between duress and inducement there is need to remind ourselves of facts as to the problem of unemployment that are now matters of common knowledge. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. The relevant statistics are gathered in the brief of counsel for the Government. Of the many available figures a few only will be mentioned. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States v. Butler*, 297 U. S. 1, 65, 66, *Helvering v. Davis*, decided herewith, *post*, p. 619. . . .

In the presence of this urgent need for some remedial expedient, the question is to be answered whether the expedient adopted has overlept the bounds of power. The assailants of the statute say that its dominant end and aim is to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government. Supporters of the statute say that its operation is not constraint, but the creation of a larger freedom, the states and the nation joining in a coöperative endeavor to avert a common evil. Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. Wisconsin was the pioneer. Her statute was adopted in 1931. At times bills for such insurance were introduced elsewhere, but they did not reach the stage of law. In 1935, four states (California, Massachusetts, New Hampshire and New York) passed unemployment laws on the eve of the adoption of the Social Security Act, and two others did likewise after the federal act and later in the year. The statutes differed to some extent in type, but were directed to a common end. In 1936, twenty-eight other states fell in line, and eight more the present year. But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors. See House Report, No. 615, 74th Congress, 1st session, p. 8; Senate Report, No. 628, 74th Congress, 1st session, p. 11. Two consequences ensued. One was that

the freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear. The other was that in so far as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the Government of the nation.

The Social Security Act is an attempt to find a method by which all these public agencies may work together to a common end. Every dollar of the new taxes will continue in all likelihood to be used and needed by the nation as long as states are unwilling, whether through timidity or for other motives, to do what can be done at home. At least the inference is permissible that Congress so believed, though retaining undiminished freedom to spend the money as it pleased. On the other hand fulfilment of the home duty will be lightened and encouraged, by crediting the taxpayer upon his account with the Treasury of the nation to the extent that his contributions under the laws of the locality have simplified or diminished the problem of relief and the probable demand upon the resources of the fisc. Duplicated taxes, or burdens that approach them, are recognized hardships that government, state or national, may properly avoid. *Henneford v. Silas Mason Co.*, *supra*; *Kidd v. Alabama*, 188 U. S. 730, 732; *Watson v. State Comptroller*, 254 U. S. 122, 125. If Congress believed that the general welfare would better be promoted by relief through local units than by the system then in vogue, the coöperating localities ought not in all fairness to pay a second time.

Who then is coerced through the operation of this statute? Not the taxpayer. He pays in fulfilment of the mandate of the local legislature. Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. See *Carmichael v. Southern Coal & Coke Co.*, and *Carmichael v. Gulf States Paper Corp.*, *supra*. For all that appears she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled. The difficulty with the petitioner's contention is that it confuses motive with coercion. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky v. United States*, *supra*. In like manner every rebate from a tax when conditioned upon conduct is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems. The wisdom of the hypothesis has illustration in this case. Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact. The point had

not been reached when Alabama made her choice. We cannot say that she was acting, not of her unfettered will, but under the strain of a persuasion equivalent to undue influence, when she chose to have relief administered under laws of her own making, by agents of her own selection, instead of under federal laws, administered by federal officers, with all the ensuing evils, at least to many minds, of federal patronage and power. There would be a strange irony, indeed, if her choice were now to be annulled on the basis of an assumed duress in the enactment of a statute which her courts have accepted as a true expression of her will. *Beeland Wholesale Co. v. Kaufman, supra*. We think the choice must stand.

In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function. The purpose of its intervention, as we have shown, is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity. Drains upon its own resources are to be checked; obstructions to the freedom of the states are to be leveled. It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation; or to any other end legitimately national. The *Child Labor Tax Case*, 259 U. S. 20, and *Hill v. Wallace*, 259 U. S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. *United States v. Constantine*, 296 U. S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future.

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United States v. Butler, supra, is cited by petitioner as a decision to the contrary. There a tax was imposed on processors of farm products, the proceeds to be paid to farmers who would reduce their acreage and crops under agreements with the Secretary of Agriculture, the plan of the act being to increase the prices of certain farm products by decreasing the quantities produced. The court held (1) that the so-called tax was not a true one (pp. 56, 61), the proceeds being earmarked for the benefit of farmers complying with the prescribed conditions, (2) that there was an attempt to regulate production without the consent of the state in which production was affected, and (3) that the payments to farmers were coupled with coercive contracts (p. 73), unlawful in their aim and op-

pressive in their consequences. The decision was by a divided court, a minority taking the view that the objections were untenable. None of them is applicable to the situation here developed.

(a) The proceeds of the tax in controversy are not earmarked for a special group.

(b) The unemployment compensation law which is a condition of the credit has had the approval of the state and could not be a law without it.

(c) The condition is not linked to an irrevocable agreement, for the state at its pleasure may repeal its unemployment law, § 903 (a) (6), terminate the credit, and place itself where it was before the credit was accepted.

(d) The condition is not directed to the attainment of an unlawful end, but to an end, the relief of unemployment, for which nation and state may lawfully coöperate.

Fourth. The statute does not call for a surrender by the states of powers essential to their quasi-sovereign existence.

Argument to the contrary has its source in two sections of the act. One section (903) defines the minimum criteria to which a state compensation system is required to conform if it is to be accepted by the Board as the basis for a credit. The other section (904) rounds out the requirement with complementary rights and duties. Not all the criteria or their incidents are challenged as unlawful. We will speak of them first generally, and then more specifically in so far as they are questioned.

A credit to taxpayers for payments made to a State under a state unemployment law will be manifestly futile in the absence of some assurance that the law leading to the credit is in truth what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books. For anything to the contrary in the provisions of this act they may use the pooled unemployment form, which is in effect with variations in Alabama, California, Michigan, New York, and elsewhere. They may establish a system of merit ratings applicable at once or to go into effect later on the basis of subsequent experience. Cf. § § 909, 910. They may provide for employee contributions as in Alabama and California, or put the entire burden upon the employer as in New York. They may choose a system of unemployment reserve accounts by which an employer is permitted after his reserve has accumulated to contribute at a reduced rate or even not at all. This is the system which had its origin in Wisconsin. What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental. Even if opinion may differ as to the fundamental quality of one or more of the conditions, the difference will not avail to vitiate the statute. In determining essentials Congress must have

the benefit of a fair margin of discretion. One cannot say with reason that this margin has been exceeded, or that the basic standards have been determined in any arbitrary fashion. In the event that some particular condition shall be found to be too uncertain to be capable of enforcement, it may be severed from the others, and what is left will still be valid.

We are to keep in mind steadily that the conditions to be approved by the Board as the basis for a credit are not provisions of a contract, but terms of a statute, which may be altered or repealed. § 903 (a) (6). The state does not bind itself to keep the law in force. It does not even bind itself that the moneys paid into the federal fund will be kept there indefinitely or for any stated time. On the contrary, the Secretary of the Treasury will honor a requisition for the whole or any part of the deposit in the fund whenever one is made by the appropriate officials. The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is that approval of the law will end, and with it the allowance of a credit, upon notice to the state agency and an opportunity for hearing. § 903 (b) (c).

These basic considerations are in truth a solvent of the problem. Subjected to their test, the several objections on the score of abdication are found to be unreal.

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There is argument again that the moneys when withdrawn are to be devoted to specific uses, the relief of unemployment, and that by agreement for such payment the quasi-sovereign position of the state has been impaired, if not abandoned. But again there is confusion between promise and condition. Alabama is still free, without breach of an agreement, to change her system over night. No officer or agency of the national Government can force a compensation law upon her or keep it in existence. No officer or agency of that Government, either by suit or other means, can supervise or control the application of the payments.

Finally and chiefly, abdication is supposed to follow from § 904 of the statute and the parts of § 903 that are complementary thereto. § 903 (a) (3). By these the Secretary of the Treasury is authorized and directed to receive and hold in the Unemployment Trust Fund all moneys deposited therein by a state agency for a state unemployment fund and to invest in obligations of the United States such portion of the Fund as is not in his judgment required to meet current withdrawals. We are told that Alabama in consenting to that deposit has renounced the plenitude of power inherent in her statehood.

The same pervasive misconception is in evidence again. All that the state has done is to say in effect through the enactment of a statute that her agents shall be authorized to deposit the unemployment tax receipts in the Treasury at Washington. Alabama Unemployment Act of September 14, 1935, § 10 (i). The statute may be repealed. § 903 (a) (6). The

consent may be revoked. The deposits may be withdrawn. The moment the state commission gives notice to the depositary that it would like the moneys back, the Treasurer will return them. To find state destruction there is to find it almost anywhere. With nearly as much reason one might say that a state abdicates its functions when it places the state moneys on deposit in a national bank.

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The inference of abdication thus dissolves in thinnest air when the deposit is conceived of as dependent upon a statutory consent, and not upon a contract effective to create a duty. By this we do not intimate that the conclusion would be different if a contract were discovered. Even sovereigns may contract without derogating from their sovereignty. *Perry v. United States*, 294 U. S. 330, 353; . . . The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. Constitution, Art. I, § 10, par. 3. . . . We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the Treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin.

Fifth. Title III of the act is separable from Title IX, and its validity is not at issue.

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The judgment is

Affirmed.

87. "STRENGTHENING FISCAL CONTROL"

Increasing realization of the importance of improved Congressional procedure is reflected in the following excerpt from Senate Report No. 1011, 79th Congress, 2d Session. For other excerpts from this report see readings in this volume numbered 53, 61, and 66.

IV. STRENGTHENING FISCAL CONTROL

Control of the purse for all Federal governmental activities is one of the major functions of Congress. Numerous witnesses appeared and recommended various changes designed to strengthen the position of Congress in relation to fiscal affairs.

These recommendations stressed the need for the adoption each year of an over-all fiscal policy that would consider both the income and

expenditures of government. It was pointed out that control over revenues and expenditures is divided not only between the House and Senate, but also within each House between its revenue and appropriating committees. Neither of the two appropriations committees imposes any over-all limitations upon its total appropriations before the individual supply bills are voted on by the Houses. Nor do they attempt to coordinate appropriations with revenues so as to fix an over-all fiscal policy for the year.

With this divided authority existing not only between the appropriation committees of each House, but also among their many sub-committees, and among the revenue-raising committees, how could Congress have a general fiscal policy or follow it if it had one?

Other recommendations called not only for strengthening the staffs of the important Appropriations Committees and their subcommittees, but made several suggestions for basic changes in methods of controlling expenditures, improving auditing procedures, and developing better administrative management in Government agencies.

Your committee agrees that primary responsibility rests with Congress to improve legislative control over governmental expenditures and that means must be provided to permit a closer scrutiny of them, not only by the committees charged with this duty, but also by the individual Members and Congress itself.

Your committee believes that Congress has not adequately equipped itself to resist the pressure of departments and agencies in behalf of larger expenditures. We have equipped the agencies with ample funds to collect and present evidence to support their appeal for larger sums or to forestall reductions. But we have failed to implement Congress with adequate facilities for scrutinizing these justifications.

1. Adoption of Annual Federal Budget Totals

Recommendation: That by joint action the Revenue and Appropriations Committees of both Houses submit to the Congress within 60 days after each session opens (or by April 15) a concurrent resolution setting over-all Federal receipts and expenditures (estimated) for the coming fiscal year. If total expenditures recommended exceed estimated income, Congress should be required by record vote to authorize creation of additional Federal debt in the amount of the excess. All appropriations, excepting those of a permanent nature, interest on the public debt, veterans' pensions and benefits, trust expenditures, and public-debt retirement, would be reduced by a uniform percentage in case total appropriations exceeded the amount of the approved budget figure.

Congress now supervises the world's largest enterprise without any coordination between its revenue-raising and appropriating committees. Neither, so far as congressional machinery is concerned, gives any con-

sideration to the ⁶⁰relationship between income and expenditures. The appropriations committees are not required by statute or rule to keep total outgo within anticipated income.

Your committee believes that only through the determination each session of a definite congressional policy on fiscal matters limiting the total amount to be appropriated can aggregate income and expenditures be properly related.

We therefore recommend legislation that will require the passage each year of a concurrent resolution setting forth total estimated receipts and expenditures for the coming fiscal year, before appropriations made by the Congress are valid.

We recommend that the revenue and appropriations committees of each House acting jointly be required to submit to each House, within 60 days after the opening of a congressional session (or by April 15), a concurrent resolution which would set out the anticipated receipts as estimated by the revenue Committees, and the total amount of Federal expenditures as estimated by the Appropriations Committees for the next fiscal year.

In the event, after consultation and investigation, that the appropriations committees are unable to bring anticipated expenditures within estimated receipts, a record vote expressing the policy of the Congress to create additional Federal debt in the amount of the excess would be required. The budget resolution would have to be approved by both Houses before any appropriation for the next fiscal year would be valid.

Should total appropriations later be found to have exceeded the total budget figure as set by the Congress, all appropriations except permanent appropriations and those for servicing the public debt, for veterans' pensions and benefits and trust expenditures, would be automatically reduced accordingly by a uniform percentage designed to bring total appropriations within the over-all limit previously fixed.

The basic legislation to provide for over-all budget control should provide, however, that these limitations would not apply during times of war emergency.

2. Organization and Staffing of Appropriations Committees

Recommendation: That all appropriation bills be fully and carefully considered by the full Appropriations Committees of both Houses; that the present practice of holding all Appropriations Committee hearings in executive or secret sessions cease; that committee hearings and reports on appropriation bills be laid before the House and Senate a minimum of three legislative days before their floor consideration; that a uniform appropriation classification be devised and incorporated in the hearings; that four qualified staff assistants be assigned to each of the appropriation subcommittees to serve both the majority and minority members; and that modern

accounting machinery and equipment be provided for each committee staff.

Your committee is of the opinion that, by greatly strengthening the House and Senate Appropriations Committees, a vast amount of money now wastefully expended can be saved without materially diminishing essential governmental functions. Indeed, there is little hope for carefully considered reductions in appropriations without definite and fundamental improvements in both House and Senate Appropriations Committee procedures and practices.

It is with a feeling of hesitation, yet with a sense of duty, that your committee makes a critical analysis of Congress' antiquated and inadequate appropriating machinery and practices.

The House Appropriations Committee, where all appropriation bills originate, now functions more as a group of independent subcommittees than as one unified committee. For instance, a bill appropriating funds for the Department of the Interior is considered by the Interior Department subcommittee. This subcommittee holds hearings in executive session from which are excluded not only the public and the press but all other Members of Congress, even the other 35 members of the Appropriations Committee who are not members of this subcommittee. Members of Congress, including members of the Appropriations Committee (other than members of that particular subcommittee) as well as the public or press, have little knowledge of what transpires within the subcommittee until the bill is reported. Opposition to the requested appropriation which, if informed through open hearings and publicity, might give much beneficial information and suggestions to the subcommittee, to the full Appropriations Committee and to Congress, is thereby stifled or, at best, put at a decided disadvantage.

Moreover, your committee is informed that the consideration of appropriation bills by the House Committee on Appropriations is perforce rather perfunctory. The full committee does not consider it necessary to give bills the same detailed examination they have already received in subcommittee. Here also all consideration is in secret session.

We understand that the usual procedure in the House Appropriations Committee, when a subcommittee reports, is for the subcommittee chairman and the ranking minority member to present a brief summary of their report to the full committee. After brief consideration and opportunity for amendments, the bill is then promptly reported to the House. In practice, careful consideration of the measure is thus limited to the members of the subcommittee in charge, upon whose judgment the full committee generally confidently relies.

Reports of the full committee on major bills customarily reach the floor soon after committee approval. Under these circumstances, the findings and printed hearings on appropriation bills are usually not available for careful and sustained study by the membership at large before the

bills are reported to the House for its action. The hearings are naturally massive in size and complex in detail. As a result, it is not easy for Members of the House fully to inform themselves on the complex contents of appropriation bills before they come up for final action on the floor.

We believe the work of the Appropriations Committees is so vital that they should be the best equipped of any committees of the Congress, for on their judgment hangs the expenditure of billions of public money.

At present the entire Appropriations Committee of the House has only eight overworked clerks and the Senate Appropriations Committee has nine. A few investigators and accountants are borrowed from time to time to augment this meager staff on a part-time basis.

Therefore we recommend that the full committee and each subcommittee of the Appropriations Committees of the two Houses be given four expertly trained staff assistants. These staff assistants would be certified for employment by the Director of Congressional Personnel as meeting high standards for that particular work, and would be paid on the same scale as other committee staff experts. Two would be assigned to the chairman of the appropriations subcommittee and two to the ranking minority member to aid them in careful study and scrutiny of budget requests with a view to reducing any unnecessary expenditures.

We further recommend that the present practice of holding all full committee meetings and all subcommittee hearings in secret or executive session be abolished except executive sessions for marking up the bills and for voting or where national security demands secrecy. All other hearings should be open to Members of Congress, the press, and the public.

We also recommend that printed committee hearings and reports on appropriation bills be laid before each house a minimum of three legislative days before floor consideration of the bill will be in order.

We further recommend that a standard appropriation classification schedule be devised which will clearly define in concise and uniform accounts the subtotals asked by agencies for their operation. Uniform classification of agency estimates by character and object should permit comparisons of expenditures by character and object as well as by organization units. This "show-case accounting" schedule should precede each agency's request for funds in the printed hearings. Modern mechanical accounting and tabulating machines should be provided for the committee staff to assist them in the preparation of data and comparisons of agency and departmental expenditures.

3. Service Audits by Comptroller General

Recommendation: That the General Accounting Office be directed to submit each year a general service audit of each agency of government (including government corporations), furnishing information to the Congress on the general financial operation of the agency and its care in handling governmental funds.

The General Accounting Office was set up as an arm of the Congress to improve the auditing of all governmental accounts. It has undoubtedly served a valued purpose in carefully checking all governmental expenditures to see that they come within the law and that amounts claimed are due.

We recommend, however, that the scope of the work of the General Accounting Office be enlarged to include a service audit of the agencies of government. Such a service audit should include reports on the administrative performance and broad operations of the agency, together with information that will enable Congress to determine whether public funds are being carelessly, extravagantly or loosely administered and spent. In most cases the present detailed audit of items does not reveal the general condition of the agency's operation. With additional help and from information secured through its routine checks on expenditures, we believe such an audit and report will be very helpful in improving careful administration of public funds.

The reports of the Comptroller General would be submitted to the Committees on Expenditures in the Executive Departments, to the Appropriations Committee of each House, to the legislative committees having jurisdiction over the agency, and to each of the majority and minority policy committees of the two Houses.

4. Discontinuance of Indefinite Appropriations

Recommendation: That all appropriations be in definite amounts and that the custom of reappropriating unexpended balances be discontinued except for continuing public works; that transfer of funds between agencies and departments be discontinued; and that all regular governmental agencies and departments be placed on a uniform basis of returning to the Treasury income from sales or services.

One of the first requirements of a proper appropriation is that it be definite and specific as to the exact amount being appropriated. For many years Congress has been departing from this well-recognized rule of legislative control in several ways which in effect deny to the Congress the full control of the purse strings of government.

Fiscal housekeeping can be greatly strengthened by eliminating some of these practices so as to give an effective system of financial control. We do not advocate further limitations on specific appropriation items for minor amounts, but we feel that these various accounts, when properly standardized by the Appropriations Committees, could be of even a broader, more inclusive nature. And we strongly believe that the amounts of money appropriated should be definitely set out in all appropriation bills.

Therefore, we recommend that the practice of reappropriating unexpended balances be discontinued, except in the case of continuing appro-

priations for public works, and that unexpended balances revert to the Treasury as provided by law. The new amounts appropriated each year should indicate the total money available to each agency.

We also recommend that the current practice of permitting transfer of funds between appropriation accounts and organization units be discontinued.

We further recommend that a uniform system of control be perfected by the appropriations committees so as to cover into the Treasury all funds resulting from the sale of Government property or services by all regular Federal departments and agencies.

5. Legislation on Appropriation Bills

Recommendation: That the practice of attaching legislation to appropriation bills be discontinued; that the rules be tightened effectively to prevent under the parliamentary guise of "economy limitations" amendments which are, in fact, designed to effect legislative changes; that the Comptroller General survey various limitations on appropriation bills to determine those which require more money to carry out than they save; and that the Appropriations Committees study means for limiting any increase in permanent appropriations.

The practice of attaching legislation to appropriation bills is often destructive of orderly procedure. Riders obstruct and retard the consideration of supply bills. Sometimes they contradict action previously approved in carefully considered legislation.

In most cases such legislation is adopted under the parliamentary guise of "limiting provisos," avoiding points of order that would be raised against them by purporting to restrict the spending of Government funds. These practices, when used for purposes other than to effect real economies, should be prohibited by a tightening of the rules.

Otherwise the regular jurisdiction of the standing committees of the House and the Senate will continue to be impinged upon by the appropriating committees. Much added work in Government departments and by private attorneys is caused by attaching legislative riders on appropriation bills.

We further recommend that the Appropriations Committees seek to restrict limiting amendments to those which genuinely effect economies. Sometimes the limiting amendments require far greater expenditure of funds to comply with the limitations imposed than would otherwise be necessary. We recommend that the Comptroller General be requested to make a study of this type of extravagant "economy limitations" with a view to eliminating those which add to Government expense rather than reduce it.

We further recommend that the Appropriations Committees make a study of existing permanent appropriations with a view to strictly limiting

and safeguarding the list (of permanent appropriations) from hastily considered additions. Permanent appropriations encumber future revenues and only after very careful consideration should any items be added to this select and privileged list.

88. INTERGOVERNMENTAL FISCAL RELATIONS

The problem of federal, state, and local fiscal relations was studied about 1942 by a small research staff, for the Secretary of the Treasury, under the guidance of Dr. Harold M. Groves, of the University of Wisconsin. The following excerpt is from the committee's report, published in 1943 as Senate Document No. 69, 78th Congress, 1st Session, entitled *Federal, State, and Local Government Fiscal Relations*.

MAJOR CONCLUSIONS AND RECOMMENDATIONS

I. Emphasis and Approach

1. Emphasis upon Cooperation

Coordination and cooperation rather than subordination and coercion is the answer to intergovernmental fiscal problems in the United States.

Our Federal system with its present division of power and responsibility is supported not only by tradition and legal precedent but also by widespread recognition of the very real values of decentralized government. The system permits adaptation of legislative programs to widely divergent conditions, interests, and points of view, which is very important in a large country; it provides room for experimentation in government; it encourages participation in government, and with it the development of sounder civic attitudes and better trained leadership; and it narrows the scope for the inefficiency and red tape that often occur in a huge bureaucracy. Coordination has become a major problem in the operation of the Federal Government.

The superior strategic position of the Federal Government in the control of large-scale business, in the stabilization of employment and production, and in the maximization of national income has justified aggressive Federal leadership and the expansion of Federal activities in recent years. But this expansion need not be at the expense of the States and the municipalities. The major consideration is how best the States may participate in this expansion, and how best they may facilitate rather than retard it. The States still continue to retain large responsibility for many governmental services close to the welfare of the citizen. The Federal Government has a vital interest in maintaining and strengthening both State and local governments. Much valuable energy has been wasted unnecessarily in quarreling over the proper spheres of the Federal Government and the States, when the seeds of solid achievement lie in the scantily tilled field of intergovernmental cooperation and coordination. Progress in this field requires some willingness to compromise, to surrender vested interests,

and to forget jealousies on the part of both the Federal Government and the States.

A change in attitude of revolutionary proportions seems to be needed. The American governmental system has not been viewed as a unit by most public officials, with loyalties evoked and encouraged for the entire system. If the mayor of a municipality believes that a change in the Federal income tax would embarrass his own government, he is likely to feel no great concern as to whether the change is needed to strengthen and equalize the Federal system of personal taxation. Federal administrators show equally unfortunate blind spots. Very often they lose, in addition, a proper sense of proportion, and conclude that all wisdom and authority are concentrated in Washington. State officials who object to this frequently show the same attitude in dealing with municipalities. Some of this is but the inherent limitation of human beings. But much of it could be eliminated by more conscious effort.

Recent decisions of the Federal Governments of Canada and Australia to federalize a large part of State tax systems for the period of the war place proponents of our overlapping tax system on the defensive. Conditions in these two Federal systems differ somewhat from our own. These countries, in contrast to our own, have a highly developed tradition of allowances (fixed grants) from the central government to the divisions. State tax rates, particularly in the income-tax field, were substantially higher for at least some of the foreign states than for our own. The tradition of local and State autonomy was probably less highly developed. Certain coordination devices, notably income-tax deductibility, were more highly developed in this country than in the British federations, but others, such as joint administration, were much less developed. Of course, even if there were no difference in conditions, it could not be concluded from these examples that the States should be excluded, in effect, from important tax fields even during the war emergency. Fiscal independence is a large sector of general independence, and the latter a large part of local self-government which, in turn, has important democratic values. It has been suggested that another major war might put an end to Federal systems everywhere. Whether or not this be true, it appears that a large degree of State and local fiscal independence does carry values of a very high order, and that they should not be sacrificed until the necessity is clearly demonstrated. It is not believed that this is yet the case.

That State rights should yield to military necessity will be generally conceded. That the war effort would be served by federalization of State revenue systems is, however, very doubtful. The Federal Government has enough on its hands for the present without assuming the responsibility for State finances unless this course would yield very important advantages in ordering its own financial program. That there would be some advantages may be conceded, but at present and in the near future these advantages seem outweighed by the disadvantages.

2. The Pragmatic Approach

An analysis of the history of the fiscal coordination movement in the United States, and of the experience in other countries, suggests that a pragmatic approach to the problems of intergovernmental fiscal relations is likely to be the most fruitful. The pragmatic approach does not exclude the necessity of some analysis of long-run principles and interests. However, hopes for a solution of the fiscal coordination problem, or for a comprehensive single plan for immediate adoption, are doomed to disappointment. Some scholars have rejected the idea of "nibbling" at the problem, bit by bit, as entirely inadequate, but it is this unspectacular method that promises most in the way of progress in what must be a cooperative venture. Indeed the preoccupation of the critics with grandiose plans for fiscal coordination may account for the rather low score of achievement to date.

A federal system involves at least two layers of government, which necessarily draw upon the same economy for support. It is almost inevitable that no matter how carefully drawn a constitution may be, some overlapping and conflict will ensue. Each authority tends to guard its own sphere of activity jealously and to resent encroachment by the other.

Under these conditions there can be no completely logical and clear-cut solution of fiscal problems. The united and uniform fiscal system of which some administrators dream is possible only in a unitary state. The best that can be achieved in a federal-state is a working compromise, even as the federal-state itself is, in its origin, a compromise.

It needs always to be remembered, also, that all movements toward coordination involve, to some extent, a choice of values. Coordination aims at uniformity, and finds one of its principal causes for action in the compliance costs and irritations associated with diversities of State laws and practices. But these diversities can be defended, too, as experiments in new and different techniques or adaptations to different conditions. Those who dislike centralization think of uniformity as vicious rather than beneficent; they apply the adjective "deadly" to what the centralizers seek. Here, as in many other matters of social policy, it is not possible to have one's cake and eat it too. It may be possible, however, to achieve some results without great loss of values. There are areas in which diversity serves no useful purpose.

A survey of foreign experience indicates that no federal form of government has developed an entirely satisfactory method for coordinating its fiscal system, much less a single panacea. Examples of almost all the coordination devices can be found in foreign experience, the selection and pattern depending considerably upon historical accident. What has worked well in one country has not always been successful in another. Australia has achieved notable success in cooperative administration, one of the less spectacular approaches to the problem, but there is no certainty that this would be equally successful under other conditions.

In short, the problems are presented and the recommendations are made in such manner that any one part is only a short step forward on the road of advancement; but if progress is likely to be slow and difficult, it is not on that account necessarily less important.

3. The Coordination Movement

The history of the fiscal coordination movement is characterized by much frustration, wishful thinking, and rationalization, but the efforts expended have brought to public attention a set of problems that are real and urgent. The movement has been led mainly by State officials, with less active participation by scholars and businessmen. It has not been supported by any ground swell of popular interest, and the lack of participation of farm and labor groups is conspicuous. There has been no crystallization of opinion concerning the problems involved, even among the experts. The movement has often failed to come to grips with fundamentals; a customary procedure has been to endorse the word "coordination," hand it to a committee, which also endorses it, delivers a few generalizations, and recommends "further study." (It must be conceded that as to some of these limitations the present report is no exception.) There has also been a conviction that a group of specialists could draft a formula or set of specifications to satisfy all parties when, as a matter of fact, many of the issues involved are beyond the province of the expert. If the time should ever arrive when Congress would feel it necessary for the Federal Government to take over the major strategic revenue sources of the States and put these governments on an allowance, no extensive study would be required to tell it how or why.

But this is not to say that the movement has failed to accomplish a useful purpose. It has called attention to real and urgent problems growing not only out of the overlapping tax system, but also out of the increasing national economic integration and interdependence. The development of huge corporations, only a little if at all less powerful than the States which charter them, and the growth of interstate trade, travel, communication, and migration, have intensified problems of multiple taxation, allocation, interstate competition, and costs of administration and compliance. One writer goes so far as to express the view that "commerce renders the mere convenience of uniformity [in laws] an almost imperious necessity." Tendencies toward instability and insecurity, coupled with increasing economic capacity, have developed an interest in over-all fiscal planning. These are only a few of the many reasons for concern about a revenue system that has developed piecemeal and is largely uncoordinated.

In the course of the history of the coordination movement, most of the principal devices for coordination have been recommended for adoption or extension. These include separation of sources, joint administration, State supplements to Federal taxes, credits, sharing of revenues, Federal and State grants-in-aid, and reallocation of functions. All these

devices have been tried either in this country or abroad. Experience suggests that no one of them will achieve desirable results under all conditions. The means must be adapted to the nature of the problem for each tax or expenditure, and for each country.

4. General Position of This Report

This report seeks a middle ground in the coordination problem. On the one extreme are the strong centralizers, who feel that State and local fiscal independence has served its usefulness and is no longer compatible with modern economic facts. The report of the Canadian Royal Commission goes far in this direction. At the other extreme are those who are satisfied with what we have and who argue that the frictions and wastes of uncoordinated taxation are the necessary price which we wisely pay for our Federal system with its large measure of local freedom. Both of these groups are more realistic than the hybrid school which hopes for a completely coordinated fiscal system with no shift in the division of governmental powers.

The centralization of all the major taxes in the hands of the Federal Government would provide a simple, logical, orderly, and well-coordinated tax system. The centralization of the major service functions would avoid the confusion of transfers of money and would enable the application of receipts where they are most needed. Together these steps would enable us to dispense largely with some 165,000 units of government. They would give the Federal Government quite ample fiscal powers to deal with our unstable private economy. But there is no assurance that the resulting unwieldy machine would not have worse internal incoordinations and inefficiencies than the external ones so apparent in our present makeshift arrangements. And the loss in intangible values might be even more serious.

But we think that there is another and sounder middle ground, which accepts the framework of the American governmental system and seeks no large shift in the division of power. This view starts with the observation that Federal-State relations have been marked by coolness, distance, suspicion, and jealousy. Governmental problems in our modern era have become so large and vital, and participation in a united attack upon them is so essential, that a new attitude, facilitated by new institutions, should be the minimum acceptable program of fiscal modification. While much weight needs to be given to the values associated with autonomous local government, these have to be balanced against the advantages, such as reduced confusion and wider perspective, which attend central control. A priori generalizations concerning centralization are of little use. Each specific problem has to be considered on its own merits. In some cases federalization of a function may (by a balance of the interests) be warranted; in others, retention of the function by States and municipalities may be called for; and most often joint participation, in one way or an-

other, may be the best solution. Decentralization within the sphere of Federal activities may also have a place in the picture. The presumption should probably favor decentralized control but it is by no means a final or conclusive presumption.

This approach to the problem calls for a high degree of genuine mutuality. State suspicion that intergovernmental cooperation will be mostly Federal domination must be dispelled. A program of full and genuine mutuality is entirely possible.

The middle way which we have sought to follow has some claim to acceptance as the American way. American belief in the dispersion of initiative and in safety of numbers is very deep. The pragmatic approach, adapting machinery to the necessities of time and place, is also American in tone. Finally, the views here taken—that private enterprise should be encouraged, not hampered, in carrying as large a share of the future economic load as its performance will justify; that government, nevertheless, must be relied upon to insure an end product in security and well-being compatible with a developing social conscience—these, too, are a part of the American tradition.

II. Plan for a Federal-State Fiscal Authority

5. Federal-State Fiscal Authority

It is recommended that a Federal-State Fiscal Authority be created. This is in line with the general approach here taken, namely, that the problem is not likely to be settled all at once, but that constant study of and readjustment in intergovernmental arrangements will be necessary; also, that the keynote in intergovernmental relations should be cooperation rather than subordination.

A Federal-State Fiscal Authority could be expected to perform the following functions:

(1) Promote close collaboration among State and Federal administrators with the objective of joint administration of selected overlapping taxes. Administrators have made some progress toward coordinated tax administration, notably in making Federal income-tax information available to the States. Also in the liquor tax field, collaboration of State and Federal officials is highly developed and has proved mutually satisfactory. However, efforts to devise and inaugurate a joint return for Federal and State income-tax reporting have proved abortive. Recent experience with the Federal automobile-use tax warrants the conclusion that effective Federal-State cooperation in administration cannot be improvised, but requires extensive negotiation and preparation. A Federal-State Fiscal Authority would be admirably suited for this role.

The administrative approach to the problem of coordination is likely to prove the most fruitful one in the case of net income taxes, business taxes, sales taxes (if the Federal Government enters this field), and pos-

sibly death taxes. Joint returns, joint audits, and joint use of administrative personnel offer possibilities for future development.

Much could be said for an Authority which would administer overlapping taxes directly. The experience of Australia, which has made greatest progress in the administrative approach to the coordination problem, points toward a joint administrative agency. But Australia's problem is simpler than that of the United States. The Commonwealth has only 6 states and their revenue systems are more important relatively than those of our 48 States. (The latter factor creates a more even balance of power than that which exists in the United States.) Eventually a Federal-State Fiscal Authority of the type here recommended might be given power to administer some taxes in its own right. But at the outset its role had best be confined to that of mediation between Federal and State officials. It should be observed, however, that joint administration is not Federal administration; a large factor of mutuality is implied.

(2) Facilitate interstate cooperation. For example, working with existing agencies, the Authority could promote reciprocity legislation, as in the licensing of out-of-State trucks.

The Council of State Governments, among others, has perceived for some time that a much greater degree of interstate cooperation is required to maintain our Federal system in a healthy condition. Some of the gravest problems in the field of intergovernmental relations might be solved if there were a sufficient degree of interstate cooperation. Of all the remedies for these many problems, interstate cooperation ranks first in its promotion of the prestige and independence of the States. But interstate cooperation, to function most efficiently, needs a "friend at court" within the Federal Government. And it needs an easy vehicle of transition from the field of interstate to that of Federal-State cooperation. A Federal-State agency should supply the factors needed to lift interstate cooperation to a much more active and more useful plane.

(3) Act as a clearinghouse for proposals relating to Federal payments in lieu of property taxes on federally owned property. In the past, legislation in this field has followed no consistent principles, and an unduly complicated pattern of procedure has developed. The Authority might also serve as a "board of appeals" to hear complaints regarding Federal payments in lieu of taxes, and the use of taxation or other instrumentalities as trade barriers.

(4) Conduct research. Evidence of high costs of excessive tax machinery, both to governments and to taxpayers, is sufficient to warrant much more intensive study than the subject has thus far received. It is surprising that almost no evidence is available concerning the compliance costs of our social-security system with its substantial reporting requirements. Similarly, only scattered and inconclusive evidence is available concerning the effects on firms engaged in interstate business of diverse apportionment formulas applied under income and business taxes. Little convincing evidence is available concerning differential tax burdens as a

factor in industrial location and relocation. These fields could be cultivated to excellent advantage, either directly by, or through the stimulation of, a Federal-State Fiscal Authority.

(5) Create public interest in intergovernmental relations. Public apathy does not signify that the problem is unimportant. That the public (except certain classes of taxpayers seriously inconvenienced by duplication) has never been much interested in the "frictional expense" involved in taxation (cost of administration and compliance) is evident enough from the paucity of data concerning these costs. Public concern in these matters, however, can and should be developed.

(6) Disseminate among the States information on Federal taxes and economic trends as they affect the States.

(7) Promote better governmental reporting, accounting, and statistics.

As to organization, it is suggested that the personnel of the Authority consist of one member appointed by the President, one selected by a conference of delegates named by State Governors, or through some other method satisfactory to the States, and one named by these two, all to be suitably qualified in the field of intergovernmental fiscal relations. Terms might be staggered, and of 4 years' duration; offices should be located in Washington.

This commission of experts should be assisted by a representative council. Intergovernmental cooperation is not likely to develop very far except through the process of a meeting of a large number of minds. Representation and conference are the essence of this procedure, and either by legislation or working rule, a Federal-State agency program should include an advisory council. The council would provide a means of getting a consensus. It should afford direct representation of congressional committees and recognized organizations of State and local and Federal officials. Further representation for municipalities might also be secured by a provision requiring that one of the three experts be especially informed on municipal affairs.

It is proposed that \$150,000 to \$200,000 be authorized as the initial budget of the Authority and that half of this fund be appropriated by the Federal Government without any contingent (matching) provision, the other half to be raised from State legislatures through the Governors and their delegates. It is recognized that the process of raising financial support in the States will involve delay and uncertainty. The Federal share should be sufficient to enable the Authority to make a showing.

The plan of organization here proposed contemplates that as soon as the Authority has been authorized by Congress and the Federal appointee has been named by the President, the latter should call upon the States to designate their appointee. The selection might be made through a conference of delegates named by the Governors. A plan for financing the State share of the Authority's cost would also be adopted by this conference. A fair method of distributing the States' share would be in pro-

portion to the amounts of State and local taxes raised. This outline of procedure is suggestive only. One alternative method would be to provide for selection of the States' representative by the Governors, the choice of a method of selection being left to the Governors.

The impression should not be conveyed that the development of administrative collaboration is impossible without a Federal-State agency. Much cooperation could be achieved without any institutional changes. New interest and a new cooperative attitude would be sufficient. But a Federal-State agency should help to develop this new outlook, and the latter might not be forthcoming without some new factor of the kind suggested.

The idea of a Federal-State Fiscal Authority is not new or original. It has been endorsed by a large number of organizations and individuals, and as an antidote to interstate trade barriers has received strong support from high-ranking Federal officials. In our opinion it would go far toward assuring that continual progress in this field of intergovernmental fiscal relationships which, under modern conditions, is becoming more and more necessary.

89. A TAX PROGRAM

Under the chairmanship of Roswell Magill and with Harley L. Lutz (Professor of Public Finance, Princeton University) as Director of Research, The Committee on Postwar Tax Policy published its second report in 1947. Major portions of the "Introduction and Summary" of this report ¹ are given below.

INTRODUCTION AND SUMMARY

Our report, entitled *A Tax Program for a Solvent America*, was published in September, 1945, little more than one month after V-J Day. In common with other tax plans, this study was made during the war, against the background of confusion and uncertainty that then existed. The projections that were then being made, in government circles and among private planning groups, with respect to the course of events, were alike fallible, although in different directions. The government's advisers erred in underestimating our rate of industrial reconversion and volume of employment. Private groups tended to underestimate the duration of the transition from war to peace.

Industrial reconversion has been slowed by labor troubles and by price control confusion, but it has, nevertheless, made substantial progress. On the other hand, fiscal reconversion has moved more slowly. Despite a great decline from the wartime expenditure peak, we have done little more than close the war deficit gap. Federal tax rates still stand close to

¹ *A Tax Program for a Solvent America: Second Report—1947* by The Committee on Postwar Tax Policy, copyright 1947 by The Ronald Press Company. Courtesy of The Ronald Press Company.

their war levels except for repeal of the excess profits tax. Even so, the President's budget for 1948, which in the practical sense may be regarded as the third postwar year, is the first to show a surplus.

In consequence, this means that through the first three postwar years, there has been no debt repayment from current revenue. Yet the national income has been far above any former peacetime level and is expected to remain high through the fiscal year 1948. The inability to bring the federal spending sufficiently under control, in an era of unprecedented prosperity, to make payments on the debt should demonstrate the weakness of the schemes for cyclical budget balance. These schemes would justify deficits in depressions on the ground that they would be offset by surpluses in the ensuing prosperity.

The transition period through which we are now passing is characterized by some factors which give rise to concern, and by others which are encouraging. These deserve brief comment.

The most serious factor in the postwar outlook, here and abroad, is the uneasy peace. The war of bullets has ended, but the war of nerves goes on. Hence defense costs are high and must remain relatively high until more settled, peaceful relationships among the nations are established.

A second reason for concern, throughout the world, is the immense destruction of wealth that occurred during the war. The great loss of life transcended all economic values, and cannot be appraised. Even in the purely material sense, however, no nation escaped entirely, but the losses elsewhere were relatively so much greater than our own as to impose large burdens upon us for foreign relief and rehabilitation, among the victors and the vanquished alike. The postwar budget, through the fiscal year 1949, at least, will be influenced by these costs.

A third source of concern is the delay in reducing the scope of the federal organization from its over-expanded war dimensions. The Congress has dealt vigorously with some aspects of its own organization and procedure. It should deal promptly, and with equal vigor, with the executive agencies, in order to bring the federal administrative organization into a compass more compatible with postwar needs. This is an essential step in permanent budget reduction.

Because of these and other conditions, the beginning of what may be called the normal postwar period in the federal finances cannot now be expected before the fiscal year 1949. In order that it be realized even then, we must press hard for the conclusion of the unfinished business remaining from the war and its aftermath.

First and foremost among the reasons for encouragement we would place the speed of industrial reconversion, which has sustained employment and national income at extraordinary levels despite interruptions which at times have been serious. Many kinds of consumer goods are still in short supply, but the pipe lines of supply are filling up.

Second, the Congress has taken a great step toward improvement of legislative procedures. The Legislative Reorganization Act of 1946 reduced

the number and consolidated the functions of Congressional committees. The Eightieth Congress has proceeded with this great task of committee readjustment with commendable promptness. The act just mentioned provided also for a legislative budget, under which, for the first time in our history, federal spending and taxing are to be considered together by the Congress as parts of a comprehensive fiscal program.

Budgetary expenditures have been greatly reduced from wartime levels. Nevertheless both expenditures and taxes stand at levels many times those of the thirties, and about twice the amounts regarded as normal in the several tax and budget studies which appeared a little over a year ago. The President and the Secretary of the Treasury have officially urged that the budget be balanced and that taxes be not reduced.

We are in hearty accord with the first objective. Certainly there is no excuse for failure to balance the budget at a time when the national income is far greater than ever before. On the other hand, we have no assurance that national income will remain year after year at or above the present figure, and the thirty years of history since World War I indicate that it may not. It is ordinary prudence, therefore, to make a determined effort in these good times to bring budgetary expenditures down and to bring them fully under control. If Congress can really accomplish these two major tasks, we can proceed to pay off the debt and reduce federal taxes from the war levels.

Some of the more important causes of a large budget and high taxes at the present time are temporary and non-recurring. Illustrations are the payments for foreign financial aid, the veterans' readjustment benefits, and some portion of the defense costs. As these abnormal elements pass out of the picture, the nation has the opportunity to move into much lower levels of spending and taxing, provided its vigilance be not relaxed. We believe that a diversified, broadly based tax system will promote this important aspect of popular financial control.

At the moment there is sharp difference of opinion over the question of tax reduction. The resistance to tax reduction at this time proceeds from two major premises. In the first place, it is easier, and in particular, it is politically easier, to leave expenditures alone than to make a vigorous effort to reduce them. Any governmental expenditure quickly acquires vested interests and supporters. Some one, government employee or interested citizen, will be hurt if cuts or eliminations are made. Such persons are vocal, and their cries are readily heard. Taxpayers are less well organized, and the direct injury to each one of them from excess expenditures is much harder to establish.

In the second place, heavy taxes appear appropriate in a time of national prosperity. Governmental spokesmen have urged that, even with present heavy income taxes (much heavier than in World War I), most citizens are "better off" than they were in the early thirties. Taxes were then much lower, but business was running at half-speed; so one could be content with the state of the nation.

The question of expenditure calls for a practical, common-sense approach by the Executive and by Congress. What functions can be performed better by government than by individuals or private enterprise? How much must be spent upon them? Certainly maintaining the Army and Navy must be a governmental function; on the other hand, price control would better be left to the operation of the market place. Many tasks had to be performed by government during the war that can be better done by private industry today. Many of the standard government offices are over-manned and have too much money to spend. Many "emergency" offices still await elimination. Interest is one of the few items of governmental expenditures that cannot be greatly reduced. But many other expenditures can be sharply cut, and the net efficiency of the particular bureau increased; activities can be eliminated, or restored to private enterprise, to the general advantage.

Heavy taxes are, of course, less devastating in times of prosperity than in times of depression. There is a good case for keeping the taxes high enough to insure some reduction of the debt, year after year. We must remember, however, that we have just gone through a period in which government has taken the lion's share of individual and corporate incomes—far more than it took in World War I. Individual rates have been reduced very slightly. There is still not enough chance for an individual to lay aside funds to take care of emergencies or old age, to buy a house, to invest in a business. It is not easy to see where adequate venture capital for the future will come from if present tax rates are continued. It is not easy to see how the newly discharged veteran is going to earn and then save enough money to acquire a business of his own.

We believe strongly in the economic system of free private enterprise. The best hope for the future of this country lies in the maintenance and growth of that system. Venturesome economic undertakings have developed this country and made it great. No particular income group has been responsible for the risk investments of the past. In particular, small investors have been an important source of venture capital and of jobs. Neither taxation nor government expenditures can create this spirit of enterprise. On the other hand, too heavy taxation discourages incentive and prevents the formation of risk capital.

Our position on the issue of tax reduction is that there must, of course, be total revenue sufficient to cover the spending, and that it is especially important to reduce the debt during periods of prosperity. But we also believe that these desirable goals can be attained while at the same time making tax reductions, provided there be a sufficient will to reduce the federal spending. No matter how the matter is viewed, expenditure is the key to tax relief. We cannot accept the view that tax reduction will compel a lowering of expenditure, because it is still easy, both as a matter of fiscal procedure and as a matter of popular psychology, to incur a deficit.

Our contribution to the doctrine of lower levels of federal spending is

in an analysis of the federal budget data, in Chapter 3. This analysis indicates that it would be possible to perform the federal functions adequately in the fiscal year 1948 for \$31.6 billion, and in the fiscal year 1949 for \$25.4 billion. At the current national income level of \$165 billion or above, a budget of \$25 billion would require a first bracket rate of 13 per cent on individual incomes if the corporate rate were 32 per cent, or a first bracket rate of 11 per cent if the corporation rate were held at 38 per cent. This assumes provision of approximately one-quarter of the total revenue from excise taxes. If national income were to decline to \$155 billion, the required initial rate of individual income tax would be 16 per cent if the corporation rate were 32 per cent, or 14 per cent if the corporation rate were to be 38 per cent.

In our discussion of these estimates we laid emphasis, which must be repeated here, upon the assumption of responsibility by the Congress to resist the numerous pressures for increased spending that are certain to emerge. Congressional "liberality" can undo all planning and all hope for tax reduction. The new procedure for a legislative budget, and an integration of spending and taxing should stiffen the Congressional resistance.

For the normal long-run future, we suggest that there may be a choice, as a matter of popular will, between a budget range of \$25-\$30 billion, and a lower range, such as \$20-\$25 billion. Our own preference would be for the latter range, with emphasis upon the lower limit of the range. . . .

The logic of our approach and our conclusion can be stated briefly and simply. We are concerned with the establishment and maintenance of high level employment, substantial national income, and advancing well-being. In popular words, we mean—more jobs, better pay, lower prices.

Taxation is burdensome. It impedes production, cuts down income, and raises prices. Yet taxes must be paid if government is to operate. The conflict of purposes is best resolved by keeping the cost of government, that is, its spending, at the lowest level consistent with the efficient performance of those services which promote the general welfare and the national security. In our judgment, once we have completed the transition from war to peace, a process which we believe can be largely completed by the end of the fiscal year 1948, it should be possible for the federal government to operate thereafter, under normal peace conditions, on a budget in the range of \$20 to \$25 billion.

THE INDIVIDUAL INCOME TAX

In our discussion of tax revision, principal emphasis has been laid on the individual income tax, for these reasons: First, its normal pre-eminence in the federal fiscal system; second, it affects directly a large proportion of all income recipients; and third, it has been made the focus of the discussion of tax relief. The third reason no doubt stems from the other two.

We considered three questions in our discussion of the individual income tax. We state these here, with a summary of our answers.

1. Is any tax relief to individuals possible? The answer is "yes."
 2. When can tax reductions be made? The answer is as budgetary expenditures are reduced.

3. If tax relief can be granted, how shall it be provided? Various ways of granting tax relief to individual income taxpayers are possible. Our approach is guided by the considerations which we regard as most important for the economy as a whole. Thus, while we recognize that an increase of personal exemptions and credits for dependents is a possible method, we do not approve it, for various reasons. These follow briefly.

(a) Even a moderate rise of the exemptions would materially narrow the taxable income base and lessen the number of income taxpayers. So small an increase of the exemption as \$100 would reduce the revenue, at 1946 tax rates, by about \$1.6 billion, and diminish the number of taxpayers by more than 4,000,000 persons.

(b) If the exemptions were increased by much more than \$100, the yield would be so greatly reduced as to preclude any further revision of the wartime income tax.

(c) The revenue loss from a substantial increase of the exemptions would compel a drastic increase of income tax rates, thus leading to a bad concentration of this tax, both with respect to the part of the national income subject to the tax and to the number of persons who would be liable.

The income tax has become the major source of federal revenue. As such, it should apply to a large number of taxpayers. Any material increase of the exemptions would narrow it to a limited class tax.

Our approach to the subject of individual income tax revision has been as objective and rational as we could make it. We have undertaken to consider the best interests of the entire economy, and not merely those of any particular group of taxpayers. Following this line of thought, we arrive at the conclusion that the most important task is a revision of the tax rate scale. This scale provides better arguments against itself than any we could devise. We find, for example, that all taxable income received above the taxable income bracket \$18,000–\$20,000 is taxed at more than 50 per cent under the 1945 Act; and that all taxable income above the taxable bracket \$70,000–\$80,000 is taxed at more than 75 per cent.

Let us come back to the major premise of our approach to the problem of tax revision. We want to see everyone—workers, managers, investors—have better opportunities and more income to spend. We believe that every citizen, regardless of what he does or what his own income may be, has a vital stake in the welfare of the economy in which he lives and works. We believe that he will be better off, no matter what he does, what his income is, or where he lives, if there is vigor and growth throughout the economic system. It is our conviction that a tax burden such as is imposed on individual incomes by existing law is inimical to the best interests of the whole economy. This is particularly the case since the incomes of the managerial group fall within the taxable income brackets at which more

than half is taken in income tax. We want to ease the income tax at the bottom of the scale, and if our suggestions as to the volume of federal spending are accepted, this can be done. But we also regard it as highly important to ease the income tax burden throughout the range of incomes. We must maintain the inflow of able managers, if our complex civilization, which rests so fully on technology, is to provide us with its potential quota of benefits.

To realize our general objective, we propose a revision of the individual income tax rates, which would set a top rate of 50 per cent on taxable income of \$100,000 and above. Further, we propose to adjust the initial rate of this scale according to the revenue need. Eventually, it should be possible to revise again the entire tax rate scale, but we recognize that attainment of this goal depends upon the reduction of expenditures to a reasonable level. In order to sustain the revenue yield, the tax rate on first bracket taxable income must remain substantial, but our plan for introducing flexibility into the tax rate scale provides for an adjustment of this first bracket rate according to the budget revenue requirements. In this way the smaller taxable incomes would be in the forefront to benefit from expenditure reductions.

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THE CORPORATION INCOME TAX

In our discussion of the corporation income tax, two major matters are presented. One is the tax rate, which is the focal point of concern for management and shareholders. The other is the general administrative attitude in dealing with the corporate taxpayers.

The present tax rate on corporation income is far above any rate imposed prior to the second World War. This is equally true, of course, of the taxes on individual incomes. We believe that there is good reason for seeking lower taxes on both corporate and individual incomes. It is not possible, with expenditures at a high level, to proceed simultaneously with a downward revision of both aspects of the income tax. Our reasons for giving the individual income tax the precedence have been given. We are convinced, however, that after there has been substantial tax relief provided for individuals, similar treatment should be accorded to the corporate taxpayers. This is particularly important in the case of new corporations, and of rapidly growing companies.

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EXCISE TAXES

In the field of excise taxation, we believe that the federal government should continue to rely upon a fairly broad excise system, in order to afford greater assurance of revenue stability and to avoid the necessity of maintaining income tax rates at as high a level as would otherwise be

necessary. There must be some offset to the drop in income tax receipts which is certain to occur with any slackening of business activity, if resort to further debt increase is to be avoided.

Our conception of a broad excise tax system is that it should extend beyond the taxes on liquors and tobacco, which means that there should continue to be substantial reliance upon the taxation of other commodities, and also some classes of services, under a manufacturers' excise, or a retailers' excise, or both in some combination. Without setting a precise quota, we believe that the excises should produce a revenue yield of the general magnitude of one-quarter of the total tax revenues.

90. MONETARY CONTROL

In an article¹ dealing with the important problem of monetary control, Clark Warburton draws significant conclusions given below. Space does not permit the use of the complete article. Serious students of American government will want to go further into the consideration of points made in these conclusions.

MONETARY CONTROL UNDER THE FEDERAL RESERVE ACT

Conclusions

The conclusions which emerge from the foregoing discussion may be stated in summary fashion, as follows:

1. The convertibility theory of monetary control embodied in the original Federal Reserve Act was not adequate to meet the monetary problems of modern society, and in fact was abandoned by monetary legislation in the early 1930's.

2. The United States government now has no agency responsible for regulating the value of money, that is, it has no agency which is responsible for preventing, on the one hand, monetary expansion leading to price inflation and, on the other hand, monetary contraction leading to price deflation and business depression.

3. The Board of Governors of the Federal Reserve System, which is generally considered to be the chief monetary agency of the federal government and has stupendous monetary power, has never been given responsibility for monetary control.

4. Monetary law in the United States is ambiguous and chaotic, does not contain a suitable principle for the exercise of the monetary power held by the Federal Reserve System, and has caused confusion in the development of Federal Reserve policy.

5. Extreme monetary maladjustments have occurred since the establishment of the Federal Reserve System, and those maladjustments are primarily responsible for the violence of economic fluctuations during the past three decades.

¹ "Monetary Control Under the Federal Reserve Act" by Clark Warburton, *Political Science Quarterly*, December, 1946; courtesy of the *Quarterly*.

6. The monetary theory which is held by the Board of Governors of the Federal Reserve System is based on inadequate examination of factual data and is a barrier to development and adoption of the kind of monetary policy needed for full production without inflation.

91. POWER TO DETERMINE MONETARY POLICY

The power of Congress with reference to controlling the currency and monetary policy is discussed in the so-called "gold-clause" cases. The first, in which a private contract is involved, is the case of *Norman v. Baltimore and Ohio Railroad Company*, 294 U. S. 240 (1935).

NORMAN v. B. & O. RAILROAD CO.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the court.

These cases present the question of the validity of the Joint Resolution of the Congress, of June 5, 1933, with respect to the "gold clauses" of private contracts for the payment of money. 48 Stat. 112.

This Resolution, . . . declares that "every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby" is "against public policy." Such provisions in obligations thereafter incurred are prohibited. The Resolution provides that "Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts."

. . . the suit was brought upon a coupon of a bond made by the Baltimore and Ohio Railroad Company under date of February 1, 1930, for the payment of \$1,000 on February 1, 1960, and interest from date at the rate of $4\frac{1}{2}$ per cent. per annum, payable semi-annually. The bond provided that the payment of principal and interest "will be made . . . in gold coin of the United States of America of or equal to the standard of weight and fineness existing on February 1, 1930." The coupon in suit, for \$22.50 was payable on February 1, 1934. The complaint alleged that on February 1, 1930, the standard weight and fineness of a gold dollar of the United States as a unit of value "was fixed to consist of twenty-five and eight-tenths grains of gold, nine-tenths fine," pursuant to the Act of Congress of March 14, 1900 (31 Stat. 45); and that by the Act of Congress known as the "Gold Reserve Act of 1934" (January 30, 1934, 48 Stat. 337), and by the order of the President under that Act, the standard unit of value of a gold dollar of the United States "was fixed to consist of fifteen and five-twenty-firsts grains of gold, nine-tenths fine," from and after January 31, 1934. On presentation of the coupon, defendant refused to pay the amount in gold, or the equivalent of gold in legal tender of the United States which was alleged to be, on February 1, 1934, according to the

standard of weight and fineness existing on February 1, 1930, the sum of \$38.10, and plaintiff demanded judgment for that amount.

Defendant answered that by Acts of Congress, and, in particular, by the Joint Resolution of June 5, 1933, defendant had been prevented from making payment in gold coin "or otherwise than dollar for dollar, in coin or currency of the United States (other than gold coin and gold certificates)" which at the time of payment constituted legal tender. Plaintiff, challenging the validity of the Joint Resolution under the Fifth and Tenth Amendments, and Article I, §1, of the Constitution of the United States, moved to strike the defense. The motion was denied. Judgment was entered for plaintiff for \$22.50, the face of the coupon, and was affirmed upon appeal. The Court of Appeals of the State considered the federal question and decided that the Joint Resolution was valid. 265 N. Y. 37; 191 N. E. 726. This Court granted a writ of *cetiorari*, October 8, 1934.

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The Joint Resolution of June 5, 1933, was one of a series of measures relating to the currency. These measures disclose not only the purposes of the Congress but also the situations which existed at the time the Joint Resolution was adopted and when the payments under the "gold clauses" were sought. On March 6, 1933, the President, stating that there had been "heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding" and "extensive speculative activity abroad in foreign exchange" which had resulted "in severe drains on the Nation's stocks of gold," and reciting the authority conferred by § 5 (b) of the Act of October 6, 1917 (40 Stat. 411), declared "a bank holiday" until March 9, 1933. On the same date, the Secretary of the Treasury, with the President's approval, issued instructions to the Treasurer of the United States to make payments in gold in any form only under license issued by the Secretary.

On March 9, 1933, the Congress passed the Emergency Banking Act. 48 Stat. 1. All orders issued by the President or the Secretary of the Treasury since March 4, 1933, under the authority conferred by § 5 (b) of the Act of October 6, 1917, were confirmed. That section was amended so as to provide that during any period of national emergency declared by the President, he might "investigate, regulate or prohibit," by means of licenses or otherwise, "any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof." The Act also amended § 11 of the Federal Reserve Act (39 Stat. 752) so as to authorize the Secretary of the Treasury to require all persons to deliver to the Treasurer of the United States "any or all gold coin, gold bullion, and gold certificates" owned by them, and that the Secretary should pay therefor "an equivalent amount of any other form of coin or currency coined or issued under the

laws of the United States" By Executive Order of March 10, 1933, the President authorized banks to be reopened, as stated, but prohibited the removal from the United States, or any place subject to its jurisdiction, of "any gold coin, gold bullion, or gold certificates, except in accordance with regulations prescribed by or under license issued by the Secretary of the Treasury." By further Executive Order of April 5, 1933, forbidding hoarding, all persons were required to deliver, on or before May 1, 1933, to stated banks "all gold coin, gold bullion and gold certificates," with certain exceptions, the holder to receive "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States." Another Order of April 20, 1933, contained further requirements with respect to the acquisition and export of gold and to transactions in foreign exchange.

By § 43 of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 51), it was provided that the President should have authority, upon the making of prescribed findings and in the circumstances stated, "to fix the weight of the gold dollar in grains nine tenths fine and also to fix the weight of the silver dollar in grains nine tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies," and it was further provided that the "gold dollar, the weight of which is so fixed, shall be the standard unit of value," and that "all forms of money shall be maintained at a parity with this standard," but that "in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum."

Then followed the Joint Resolution of June 5, 1933. There were further Executive Orders of August 28 and 29, 1933, October 25, 1933, and January 12 and 15, 1934, relating to the hoarding and export of gold coin, gold bullion and gold certificates, to the sale and export of gold recovered from natural deposits, and to transactions in foreign exchange, and orders of the Secretary of the Treasury, approved by the President, on December 28, 1933, and January 15, 1934, for the delivery of gold coin, gold bullion and gold certificates to the United States Treasury.

On January 30, 1934, the Congress passed the "Gold Reserve Act of 1934" (48 Stat. 337) which, by § 13, ratified and confirmed all the actions, regulations and orders taken or made by the President and the Secretary of the Treasury under the Act of March 9, 1933, or under § 43 of the Act of May 12, 1933, and, by § 12, with respect to the authority of the President to fix the weight of the gold dollar, provided that it should not be fixed "in any event at more than 60 per centum of its present weight." On January 31, 1934, the President issued his proclamation declaring that he fixed "the weight of the gold dollar to be 15 5/21 grains nine tenths fine," from and after that date.

We have not attempted to summarize all the provisions of these measures. We are not concerned with their wisdom. The question before the

Court is one of power, not of policy. And that question touches the validity of these measures at but a single point, that is, in relation to the Joint Resolution denying effect to "gold clauses" in existing contracts. The Resolution must, however, be considered in its legislative setting and in the light of other measures *in pari materia*.

First. The interpretation of the gold clauses in suit. . . .

We are of the opinion that the gold clauses now before us were not contracts for payment in gold coin as a commodity, or in bullion, but were contracts for the payment of money. The bonds were severally for the payment of one thousand dollars. We also think that, fairly construed, these clauses were intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and against the discharge of the obligation by a payment of lesser value than that prescribed. When these contracts were made they were not repugnant to any action of the Congress. In order to determine whether effect may now be given to the intention of the parties in the face of the action taken by the Congress, or the contracts may be satisfied by the payment dollar for dollar, in legal tender, as the Congress has now prescribed, it is necessary to consider (1) the power of the Congress to establish a monetary system and the necessary implications of that power; (2) the power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority; and (3) whether the clauses in question do constitute such an interference as to bring them within the range of that power.

Second. The power of the Congress to establish a monetary system. It is unnecessary to review the historic controversy as to the extent of this power, or again to go over the ground traversed by the Court in reaching the conclusion that the Congress may make treasury notes legal tender in payment of debts previously contracted, as well as of those subsequently contracted, whether that authority be exercised in course of war or in time of peace. *Knox v. Lee*, 12 Wall. 457; *Juilliard v. Greenman*, 110 U. S. 421. We need only consider certain postulates upon which that conclusion rested.

The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Art. I, § 8, par. 5. But the Court in the legal tender cases did not derive from that express grant alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the government was framed,"—"a national government, with sovereign powers." *McCulloch v. Maryland*, 4 Wheat. 316, 404-407; *Knox v. Lee*, *supra*, pp. 532, 536; *Juilliard v. Greenman*, *supra*, p. 438. The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the

Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Juilliard v. Greenman*, *supra*, pp. 439, 440.

The Constitution "was designed to provide the same currency, having a uniform legal value in all the States." It was for that reason that the power to regulate the value of money was conferred upon the Federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the States. The States cannot declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in the Congress. *Knox v. Lee*, *supra*, p. 545. Another postulate of the decision in that case is that the Congress has power "to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof." *Id.*, p. 553. Or, as was stated in the *Juilliard* case, *supra*, p. 447, the Congress is empowered "to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments." The authority to impose requirements of uniformity and parity is an essential feature of this control of the currency. The Congress is authorized to provide "a sound and uniform currency for the country," and to "secure the benefit of it to the people by appropriate legislation." *Veazie Bank v. Fenno*, 8 Wall. 533, 549.

Moreover, by virtue of this national power, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan v. United States*, 218 U. S. 302, 310. Those limitations arise from the fact that the law "gives to such coinage a value which does not attach as a mere consequence of intrinsic value." Their quality as legal tender is attributed by the law, aside from their bullion value. Hence the power to coin money includes the power to forbid mutilation, melting and exportation of gold and silver coin,—“to prevent its outflow from the country of its origin.” *Id.*, p. 311.

Dealing with the specific question as to the effect of the legal tender acts upon contracts made before their passage, that is, those for the payment of money generally, the Court, in the legal tender cases, recognized the possible consequences of such enactments in frustrating the expected performance of contracts,—in rendering them "fruitless or partially fruitless." The Court pointed out that the exercise of the powers of Congress may affect "apparent obligations" of contracts in many ways. The Congress may pass bankruptcy acts. The Congress may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo, which may operate seriously upon existing contracts. And the Court reasoned

that if the legal tender acts "were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law." The conclusion was that contracts must be understood as having been made in reference to the possible exercise of the rightful authority of the Government, and that no obligation of a contract "can extend to the defeat" of that authority. *Knox v. Lee, supra*, pp. 549-551.

On similar grounds, the Court dismissed the contention under the Fifth Amendment forbidding the taking of private property for public use without just compensation or the deprivation of it without due process of law. That provision, said the Court, referred only to a direct appropriation. A new tariff, an embargo, or a war, might bring upon individuals great losses; might, indeed, render valuable property almost valueless,—might destroy the worth of contracts. "But whoever supposed" asked the Court, "that, because of this, a tariff could not be changed or a non-intercourse act, or embargo be enacted, or a war be declared." The Court referred to the Act of June 28, 1834, by which a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of the measure was that all creditors were subjected to a corresponding loss, as the debts then due "became solvable with six per cent. less gold than was required to pay them before." But it had never been imagined that there was a taking of private property without compensation or without due process of law. The harshness of such legislation, or the hardship it may cause, afforded no reason for considering it to be unconstitutional. *Id.*, pp. 551, 552.

The question of the validity of the Joint Resolution of June 5, 1933, must be determined in the light of these settled principles.

Third. The power of the Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority. The instant cases involve contracts between private parties, but the question necessarily relates as well to the contracts or obligations of States and municipalities, or of their political subdivisions, that is, to such engagements as are within the reach of the applicable national power. The Government's own contracts—the obligations of the United States—are in a distinct category and demand separate consideration. See *Perry v. United States*, . . .

The contention is that the power of the Congress, broadly sustained by the decisions we have cited in relation to private contracts for the payment of money generally, does not extend to the striking down of express contracts for gold payments. The acts before the Court in the legal tender cases, as we have seen, were not deemed to go so far. Those acts left in circulation two kinds of money, both lawful and available, and contracts for payments in gold, one of these kinds, were not disturbed. The Court did not decide that the Congress did not have the constitutional power to invalidate existing contracts of that sort, if they stood in the way

of the execution of the policy of the Congress in relation to the currency. Mr. Justice Bradley, in his concurring opinion, expressed the view that the Congress had that power and had exercised it. *Knox v. Lee, supra*, pp. 566, 567. . . .

Here, the Congress has enacted an express interdiction. The argument against it does not rest upon the mere fact that the legislation may cause hardship or loss. Creditors who have not stipulated for gold payments may suffer equal hardship or loss with creditors who have so stipulated. The former, admittedly, have no constitutional grievance. And, while the latter may not suffer more, the point is pressed that their express stipulations for gold payments constitute property, and that creditors who have not such stipulations are without that property right. And the contestants urge that the Congress is seeking not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred.

This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson Water Co. v. McCarter*, 209 U. S. 349, 357.

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The power of the Congress in regulating interstate commerce was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. The reason is manifest. To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by "prophetic discernment" to bring within the range of their agreements. The Constitution recognizes no such limitation. . . .

The same reasoning applies to the constitutional authority of the Congress to regulate the currency and to establish the monetary system of the country. If the gold clauses now before us interfere with the policy of the Congress in the exercise of that authority they cannot stand.

Fourth. The effect of the gold clauses in suit in relation to the monetary policy adopted by the Congress. Despite the wide range of the discussion at the bar and the earnestness with which the arguments against the validity of the Joint Resolution have been pressed, these contentions necessarily are brought, under the dominant principles to which we have referred, to a single and narrow point. That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisal of economic conditions and upon determinations of questions

of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final. *McCulloch v. Maryland*, . . .

.

The devaluation of the dollar placed the domestic economy upon a new basis. In the currency as thus provided, States and municipalities must receive their taxes; railroads, their rates and fares; public utilities, their charges for services. The income out of which they must meet their obligations is determined by the new standard. Yet, according to the contentions before us, while that income is thus controlled by law, their indebtedness on their "gold bonds" must be met by an amount of currency determined by the former gold standard. Their receipts, in this view, would be fixed on one basis; their interest charges, and the principal of their obligations, on another. It is common knowledge that the bonds issued by these obligors have generally contained gold clauses, and presumably they account for a large part of the outstanding obligations of that sort. It is also common knowledge that a similar situation exists with respect to numerous industrial corporations that have issued their "gold bonds" and must now receive payments for their products in the existing currency. It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which, it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the basis of one dollar of that currency.

We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right. We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration. Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts. In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority. The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and States and municipalities, may make and enforce contracts which may limit that authority. Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that

the Congress arbitrarily or capriciously decided that such an interference existed.

The judgment and decree, severally under review, are affirmed.

No. 270. Judgment affirmed.

Nos. 471 and 472. Decree affirmed.

MR. JUSTICE McREYNOLDS, MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, AND MR. JUSTICE BUTLER DISSENT....

92. REGULATION OF CURRENCY, A SOVEREIGN POWER

Attention is directed to a comparison of the opinion of Mr. Chief Justice Hughes with the concurring opinion of Mr. Justice Stone in the second of the "gold-clause" cases: *Perry v. United States*, 294 U. S. 330 (1935).

PERRY v. UNITED STATES

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

The certificate from the Court of Claims shows the following facts:

Plaintiff brought suit as the owner of an obligation of the United States for \$10,000, known as "Fourth Liberty Loan 4¼% Gold Bond of 1933-1938." This bond was issued pursuant to the Act of September 24, 1917 (40 Stat. 288), as amended, and Treasury Department circular No. 121, dated September 28, 1918. The bond provided: "The principal and interest hereof are payable in United States gold coin of the present standard of value."

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The Court of Claims has certified the following questions:

"1. Is the claimant, being the holder and owner of a Fourth Liberty Loan 4¼% bond of the United States, of the principal amount of \$10,000, issued in 1918, which was payable on and after April 15, 1934, and which bond contained a clause that the principal is 'payable in United States gold coin of the present standard of value,' entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond?

"2. Is the United States, as obligor in a Fourth Liberty Loan 4¼% gold bond, Series of 1933-1938, as stated in Question One, liable to respond in damages in a suit in the Court of Claims on such bond as an express contract, by reason of the change in or impossibility of performance in accordance with the tenor thereof, due to the provisions of Public Resolution No. 10, 73rd Congress, abrogating the gold clause in all obligations?"

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There is no question as to the power of the Congress to regulate the value of money, that is, to establish a monetary system and thus to determine the currency of the country. The question is whether the Congress can use that power so as to invalidate the terms of the obligations which the Government has theretofore issued in the exercise of the power to borrow money on the credit of the United States. In attempted justification of the Joint Resolution in relation to the outstanding bonds of the United States, the Government argues that "earlier Congresses could not validly restrict the 73rd Congress from exercising its constitutional powers to regulate the value of money, borrow money, or regulate foreign and interstate commerce"; and, from this premise, the Government seems to deduce the proposition that when, with adequate authority, the Government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient. The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money "*on the credit of the United States*," the Congress is authorized to pledge that credit as an assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government.

.

We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.

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In considering what damages, if any, the plaintiff has sustained by the alleged breach of his bond, it is hence inadmissible to assume that he

was entitled to obtain gold coin for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin which the Congress had the power to exert, and had exerted, in its monetary regulation. Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred. The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which "all forms of money" of the United States were to be "maintained at a parity," had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was non-existent.

Plaintiff demands the "equivalent" in currency of the gold coin promised. But "equivalent" cannot mean more than the amount of money which the promised gold coin would be worth to the bondholder for the purposes for which it could legally be used. That equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market which the Congress had lawfully established. In the domestic transactions to which the plaintiff was limited, in the absence of special license, determination of the value of the gold coin would necessarily have regard to its use as legal tender and as a medium of exchange under a single monetary system with an established parity of all currency and coins. And in view of the control of export and foreign exchange, and the restricted domestic use, the question of value, in relation to transactions legally available to the plaintiff, would require a consideration of the purchasing power of the dollars which the plaintiff could have received. Plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever. On the contrary, in view of the adjustment of the internal economy to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements, the payment to the plaintiff of the amount which he demands would appear to constitute not a recoupment of loss in any proper sense but an unjustified enrichment.

Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar he is entitled to one dollar and sixty-nine cents in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable.

In the view that the facts alleged by the petition fail to show a cause of action for actual damages, the first question submitted by the Court of Claims is answered in the negative. It is not necessary to answer the second question.

Question No. 1 is answered "No."

MR. JUSTICE STONE, concurring.

I agree that the answer to the first question is "No," but I think

our opinion should be confined to answering that question and that it should essay an answer to no other.

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I therefore do not join in so much of the opinion as may be taken to suggest that the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause, its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds.

MR. JUSTICE McREYNOLDS, MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, AND MR. JUSTICE BUTLER DISSENT. . . .

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XVI

Commerce and Labor



93. THE ECONOMIC ORDER AND DEMOCRACY
Agar, Pursuit of Happiness
94. A COMPENSATED ECONOMY
Lippmann, The Method of Freedom
95. FEDERAL POWER IN LABOR DISPUTES
N. L. R. B. v. Jones & Laughlin Steel Corp.
96. CONTROLLING THE MANUFACTURING
PROCESS
United States v. Darby
97. CONTROLLING AGRICULTURAL PRODUCTION
Wickard v. Filburn
98. INSURANCE IS COMMERCE
*United States v. South-Eastern Underwriters
Association et al.*
99. INTERSTATE RAILWAYS
*Munro, "Civil War Splits America's
Railroad Empire"*
100. FEDERAL LABOR POLICY
Metz and Jacobstein, A National Labor Policy
101. STOPPING STRIKE AGAINST GOVERNMENT
United States v. United Mine Workers

DEVELOPMENT in transportation and communication, growth of nation-wide enterprises and labor unions have led to a need for governmental controls more comprehensive than those exercised by the several states. Ways in which the powers of the central government have been and might be used to meet this need are seen in this chapter.

COMMERCE AND LABOR



93. THE ECONOMIC ORDER AND DEMOCRACY

In the following reading¹ Herbert Agar makes stimulating suggestions as to the relationship of the economic order to the democratic ideal. Agar (b. 1897) became editor of the *Louisville Courier Journal* in 1940. He served as special assistant to the American ambassador at London and director of the British Division, Office of War Information of the United States, in 1943. His writings include: *The People's Choice* (Pulitzer prize for American history); *Land of the Free; What is America?*; and *A Time for Greatness*.

by Herbert Agar

Democracy cannot be understood if it is pictured solely as a political or economic system. Underlying all else, democracy must be a moral code, or it will not be effective. The concept of democracy has never been well defined; perhaps it eludes definition. But since this book is the story of a political party which has usually thought it believed in democracy, and which has occasionally tried to practice it, some description of what the word has meant to our great American democrats must be attempted.

(There are three parts to the democratic ideal: the spiritual affirmation on which it rests, the economic order which it demands, and the political machinery which puts it into effect.) I have stated the three parts in the order of their importance. The third is the least important part of democracy, and it is the only part which exists fully in a place like New York City. It is a mere tool, capable of implementing democracy, if democracy should exist. But if democracy does not exist, the tool cannot bring it into being. The tool will merely be used for other purposes.

As a spiritual affirmation, democracy says that all men have certain minimum rights and requirements which must not be denied—the right to look after themselves and their families in decency without being forced into a slave relationship toward a master or toward the State, the right to a chance to do as well for themselves as their endowments permit, the right to the great basic freedoms which go with the name of civil liberties, the right to a recognition that in a true sense (perhaps best stated by the phrase, ‘in the eyes of God’) all men are equal.

¹ From *Pursuit of Happiness: The Story of American Democracy* by Herbert Agar; copyright, 1938, Houghton Mifflin Co.; used by permission of publisher.

These phrases have become smooth and soothing through much use. But if they be taken seriously, they are fighting words. They are almost as revolutionary as Christianity. There is nothing polite about them, nothing easy, nothing which can make the least concession to the Caldwells or the builders of Ducktown. We must decide whether to take the phrases seriously, or whether to abandon them once and for all. We can no longer afford to use them merely as magic spells to keep our consciences quiet. We are reaching an interesting moment in our history when we shall have to choose between the spirit which tolerates Ducktowns, tolerates Banks of Tennessee, tolerates the mine villages where men sell their wives, and the spirit which wars on these things to the end, wars on them at any cost in inconvenience to the more lucky members of society. Only the latter spirit can build or preserve a democracy.

On the economic side democracy demands that society be so ordered that the spiritual affirmation has a chance to come true. It demands that men shall not be chattel slaves or wage slaves. It demands that there shall not be such differences in economic opportunity, and in chances for self-betterment, that people at the bottom are denied hope.

This, too, is revolutionary; but it is a necessary deduction from the first point. It is dishonest to pretend to accept an ideal if we are unwilling to arrange the physical facts of life in such a way as to give the ideal a chance to come true. Over large areas of Jimmy Hines's New York, in much of our farming country, in many of our mine and textile towns, it is ironic to talk about a man's 'right' to look after himself and his family in decency. The time has come to give up pretending to believe in that right, or else to give up pretending that conditions in many parts of our country can be endured.

On the political side democracy demands such machinery of government as will enable the free man, the citizen who is neither spiritually nor economically enslaved, to express his will, to have his way when he is in a majority, to seek to persuade his fellow-citizens when he is in a minority. This political machinery exists in America. It is the only aspect of democracy which we have fully attained. By itself, however, the political machinery means little. If we forget the spiritual demand of democracy, if we let ourselves be persuaded that the economic demand is so difficult that it is impractical and may therefore be ignored, there is no use flattering ourselves that we are a democratic state, merely because we have met the third and easiest of the demands. Political democracy alone, without spiritual and economic democracy behind it, is a fraud. And because it is a fraud, it breeds corruption.

We give the vote, for example, to every adult in Jimmy Hines's district. But we do not give those people economic freedom, or even that minimum of economic safety which helps a man be true to his better nature. And we do not give them the feeling that we really believe all men have a right to self-respect and freedom, or that all men in the eyes of heaven are equal. So what do they do with their vote? They sell it to Jimmy

Hines for 'a pair of shoes, a scuttle of coal, a parole, a job, or a bottle of milk.' But suppose our citizens could have these commodities without graft? Suppose America, the richest country in the world, had as little grinding poverty as Sweden, as much equality of opportunity as Denmark? Jimmy Hines would go out of business.

Another field in which we can see the machinery of political democracy breaking down under the absence of real democracy is the field of policy-making. If our democracy were vital, the major policies of government would be formed by a process of public argument. 'Such an argument,' as the National Policy Committee has pointed out, 'is the very essence of the democratic process. In a country where democratic procedure prevails, the Executive does what he finds to be politically possible after an open argument has run its course, instead of merely doing what his experts tell him is best for the country. It does not make much difference who starts the argument. The Executive may start it, or the Legislature, or some group of private citizens. The important thing is that, prior to the enactment of legislation, or the initiation of administrative action, an argument should be started and carried on—citizens arguing with each other and with the government until the issue is defined and the alternatives are understood.'

In the absence of such creative argument, the Executive is forced to formulate policy, on expert advice, and to push the appropriate laws through the Legislature by means of party discipline. But these policies may be inadequate, or actively unpopular to that large part of the public which has had no hand in their formulation. The Executive may then be driven to popularize his policies by the use of propaganda. Or some demagogue like Father Coughlin or Huey Long may take advantage of the public's bewilderment, may use the modern machinery of propaganda to foist off ready-made answers upon a public which has not faced the questions, has not argued them at home, has not heard them debated in public.

In these ways the democratic machinery is step by step perverted into the machinery for a dictatorship. The essence of modern dictatorships is that the leader first initiates policy and the people are then propagandized into voting 'Yes' by overwhelming majorities. The essence of democracy is that the people first discuss and argue over policy, lengthily and inefficiently, and the Executive then 'does what he finds to be politically possible after an open argument has run its course.'

An important point to notice, and a hopeful point, is that the size of America does not defeat this process of open argument. For purposes of argument and public debate, America is smaller today than she was in the days of Jefferson and Jackson. For these purposes, America is smaller today than was the State of Virginia in the days of Jefferson and Jackson. Public policy-making is not defeated by geography or by Fate. It is defeated by our neglect of the two prime aspects of democracy—the spiritual ideal and the economic order. President Roosevelt says that a

third of our people are 'ill-clothed, ill-housed, and ill-fed.' The statement is probably optimistic. And every report, public and private, on our system of popular education reveals a deplorable mediocrity. Can we expect these people to play a vital part in democratic policy-making? Can we expect such a response from people who know we do not mean what we are saying when we talk of equality, and who know furthermore that we are not doing our best to provide a larger chance of equality for their children?

Modern means of communication can help support a true democracy, or they can help turn a fraudulent democracy into a tyrant State. But no machinery can do either of these things by itself. The result depends on the moral purpose of the citizens.

We shall never reform our society merely through trying, from time to time, to tinker with the political machine—passing direct primary laws, or laws to secure an 'honest count,' etc. The result of 'reform' has always been disappointing—and for a good reason. For even if the political machinery should at last be made perfect, there would still be no true democracy in America until we had faced the other two demands. So long as we are the sort of people who tend to admire a Rogers Caldwell, we shall never really fight for the spiritual side of democracy. So long as we are the sort of people who can accept, without revolt, the misery of a Ducktown and the squalor of Jimmy Hines's district, we shall never attain the economic side of democracy. And no political reform can save us until we accept the moral and economic obligations of our ideal.

94. A COMPENSATED ECONOMY

In the following reading¹ Walter Lippmann discusses "free collectivism" as a method of overcoming "the disorders of capitalism." The future of capitalism is a question of utmost importance to the student of American government.

Lippmann (b. 1889) was associated editorially with *The New Republic* and the *New York World* before he devoted his time primarily to special writing for newspapers. His writings include: *A Preface to Politics*; *Public Opinion*; *A Preface to Morals*; *The Good Society*; and *U. S. War Aims*.

by Walter Lippmann

2. THE PRINCIPLES OF A COMPENSATED ECONOMY

It is often assumed in current discussion that all the nations must make an exclusive choice between the old theoretically neutral state on the one hand and some form of the absolute collectivism and a directed economy on the other. The militant partisans have done their best to narrow the choice to these alternatives. Yet there exists a radically different method which is actually in use in most of the free countries. It does not as yet have a spectacular name, a great dialectical apparatus, a

¹ From *The Method of Freedom* by Walter Lippmann; copyright, 1935, The Macmillan Co.; used by permission of publisher.

magniloquent philosophy, perfervid oratory, or mass emotion. But it is the method of those people who have had the largest experience in the art of self-government and the conduct of modern economic enterprise. That gives the method great authority, and the time has come, I believe, to recognize that there has appeared, principally among the English-speaking peoples, a method of social control which is not laissez-faire, which is not communism, which is not fascism, but the product of their own experience and their own genius.

I shall call it the method of free collectivism. It is collectivist because it acknowledges the obligation of the state for the standard of life and the operation of the economic order *as a whole*. It is free because it preserves within very wide limits the liberty of private transactions. Its object is not to direct individual enterprise and choice according to an official plan but to put them and keep them in a working equilibrium. Its method is to redress the balance of private actions by compensating public actions.

The system of free collectivism originates not in military necessity but in an effort to correct the abuses and overcome the disorders of capitalism. In the first instance it takes the form of measures which set limits within which private initiative is confined and fix standards to which it must conform. This part of the system has a long history and is well understood. It is based upon a recognition of the fact that initiative may be evil as well as good, and that it is the duty of the state to encourage initiative when it is socially beneficent and to discourage it when it is not.

Thus it comprises measures to prevent fraud as between buyers and sellers: honest weights and measures, the enforcement of equitable contracts, the suppression of counterfeiting and the misrepresentation of goods. It comprises measures to equalize the bargaining power of the consumer and of the employee: the regulation of public utilities, factory laws, and minimum wage laws. It comprises measures to break up monopolies, to discourage harmful enterprises, to prevent nuisances, to restrict speculation, to repress a too rampant individualism in the use of property. It comprises measures to insure the weak against the hazards of existence and to restrain the strong from accumulating excessive wealth and power.

The body of laws which regulates enterprise is enormous, and however foolish or unworkable some of these laws may be, no one imagines that all these laws are unnecessary. In fact, there is every reason to think that if a regime of free transactions is to be preserved, even more searching and comprehensive standards will have to be set for it. It is more than likely, for example, that secrecy in corporate accounting will have to be abolished, that all large enterprises will have to submit to publicly instituted systems of bookkeeping, and that their whole financial structure will become as visible as that of a railroad or a municipal corporation. For it is only by making publicly available to everyone the whole position of these enterprises that the relations of capital and labor, of corporation

and investor, of industry and consumer can be lifted to a plane where transactions are really free because all the relevant facts are known. To preserve the reality of free contract it will almost surely be necessary to abolish the sham freedom of corporate secrecy.

But all of this does not go to the heart of the matter. It can prevent abuses. It does not reach the vital defect of individualism which is that the multitude of individual decisions is not sufficiently enlightened to keep the economy *as a whole* in working order. Regulation is essentially negative. In the main it merely forbids this or that. But it is not possible to prohibit by laws the cumulative errors which produce the cycles of boom and depression. The state cannot make laws against the excessive optimism of prosperity or the panic pessimism of the ensuing crash. Yet it is in this cycle that the supreme danger arises. For the social order has now become so intricate that any serious breakdown in its economy will unloose forces that may destroy it.

Not only is it impossible to control the rhythm of capitalism by regulating laws but the very attempt to do it is as likely as not to accentuate the violence of the maladjustment. The experience of the post-war years has shown with great conclusiveness that the effort to control depression at some particular point, say at the price of wheat, or at the price of gold, or at the wage rate in some sheltered industry, or at a threatened bank or railroad—merely makes a part of the economy rigid and forces the rest of it to bend all the more.

The post-war economic cycle demonstrated clearly that individual decisions were not sufficient to create a lasting prosperity and that individuals could not endure the remedy of individual readjustment. The classical theorists over-estimated the enlightenment which is based on self-interest and the fortitude based upon self-reliance. The event has shown that the individual judgment upon which they relied exclusively has in the crucial cases meant that the individual followed the crowd. Imitation, the herd instinct, the contagion of numbers, fashions, moods, rather than a truly enlightened self-interest, have tended to govern the economy.

This submerging of individualism in mass behavior is the consequence of the increasing complexity of the economic order. The data for a "sound" judgment are not any longer available to most men. For an integral part of every judgment is now a speculation on what other speculators will do. Take, for example, a banker who makes a loan to a reliable individual for a useful project on ample security at existing values. By every conventional rule it is a sound loan. Yet it may be a bad loan for no other reason than that too many bankers have made too many equally sound loans to too many reliable individuals for too many similar projects. The algebraic sum of a great number of reputable transactions may easily prove to be a disaster for all. We have seen this illustrated again and again in recent years. We have seen it in another phase of the cycle, when the individual decision to call a loan and make himself liquid becomes a collec-

tive disaster if the whole mass of individuals is stricken with prudence at the same time.

It follows that if individuals are to continue to decide when they will buy and sell, spend and save, borrow and lend, expand and contract their enterprises, some kind of compensatory mechanism to redress their liability to error must be set up by public authority. It has become necessary to create collective power, to mobilize collective resources, and to work out technical procedures by means of which the modern state can balance, equalize, neutralize, offset, correct the private judgments of masses of individuals. This is what I mean by a Compensated Economy and the method of Free Collectivism.

It is a conception which is not spun out of abstract theory. It is rather an induction from many experiments actually undertaken. The oldest example of the method is to be found in the operation of a highly developed central bank. The function of such a bank is to correct the decisions of the member banks. It is supposed to contract credit when they show a tendency to over-expand credit, and to make credit abundant when they are making it scarce. In the Nineteenth Century it was believed that a central bank was performing its compensatory function adequately when it managed the flow of domestic credit in such a way as to preserve the parity of the foreign exchanges without large shipments of gold. More recently central bankers have been called upon to manage the flow of domestic credit with a view to stabilizing domestic trade, and, since the war, but more especially since 1931, the maintenance of exchange parity has tended to become a secondary concern as compared with the internal equilibrium.

For the purposes of this discussion the different theories as to the objectives of central banking policy are of no consequence. The immediate point is that a public institution already exists of which the function is to compensate and balance private transactions at a vital point in the social economy. As that function becomes more clearly recognized, the procedure and the instruments needed to perform it more effectively can be invented and tested in practice. Experience has seemed to indicate, for example, that a central bank is a more powerful engine for controlling a boom than for overcoming a depression. Up to the present time the instruments of compensation available to a central bank have been chiefly the discount rate and the purchase and sale of securities in the open market. It appears that at least in the early stages of a boom it is possible to stop over-expansion of private credit by raising the rate and by selling securities. If the central bank could be relied upon to apply these remedies promptly and thoroughly, it might be that the situation would never get out of hand.

But we cannot afford to count upon it alone. We must be prepared for greater emergencies. When a severe depression sets in, the instruments of compensation now available to central banks are not very effective. Lowering the rate, making money cheap, and large open market

purchases of securities, which put the banks in a position where theoretically they can expand credit, are not effective enough. They may work in the long run. But the long run is too long. Consequently experiments have been made, and others considered, to test new instruments of monetary management that have a more direct impact upon the general price level. These are the experiments with a variable price for gold and silver and with a managed supply of incontrovertible paper money. They concern us here only because they indicate the possibilities of far-reaching developments in the art of collective compensation of private transactions.

But it is not only through the central banks that the modern state can assert compensatory control. It can act directly upon the various markets. This method is also recognized and has been tested experimentally. The state is itself a great employer, a great consumer, a great investor, and a great borrower. It can in theory,—and with experience it can probably learn how actually to do this,—time its operations so as to offset and balance the actions of private employers, consumers, investors, and borrowers. This involves the long range planning of public works of all kinds, and action in accordance with those plans as circumstances require. These are immense difficulties, I know, but they are, I believe, the difficulties of inexperience with a new social mechanism. There is nothing inherently impossible about a policy which would require the government to raise taxes and reduce its debts in good times and to lower taxes and borrow in bad times, to curtail public works, which means its demand for labor and materials, when private employment is full, and to promote public works when private work is slack.

The compensatory form of collective control can be carried further into the domestic economy. The state now possesses instrumentalities which can produce most powerful effects. One of these is taxation. Through taxation it is possible to do many things besides raise revenue; indeed all taxes do have far-reaching social and economic consequences. Taxes can be raised so as to discourage all enterprise or any particular enterprise. They can be lowered in order to encourage all or any particular enterprise. They can be used to curtail consumption or capital investment. They can be used to encourage them. An ideal system of taxation would, therefore, be flexible so that rates rose when business was tending toward a boom and fell when it was slowing down. It would also be discriminating so as to encourage or discourage saving with a view to preserving the equilibrium between saving and investment.

Another powerful instrument is the state's control over the rates charged by common carriers and public utilities. These rates ought to rise in the upward phase of the business cycle and to fall in the downward phase, and under a proper system of reserves there is no inherent reason why public utilities should not be managed as a compensatory mechanism. It is even conceivable that they should be treated like public works, that they should make long-term plans of development, and that they should withhold projects in good times and push them in bad times.

Thus, instead of competing for labor and materials with the rest of industry, they would complement the operations of private industry.

Such mechanisms, in conjunction with a strong central bank which was clear about its function, would provide an enormously powerful system of compensatory control. But they would still not be sufficient to keep the economy in balance. For no modern economy is self-contained, and it is, therefore, necessary to take measures to keep it in balance with the outer world. For that reason, modern nations will come, I should guess, to what amounts to a budgeting of their international payments. The state will be concerned not only with its own domestic budget but with the balance of payments across the national boundaries. It will seek to regulate those payments through a manipulation of tariffs, bounties, and through public control of the volume and at least the general direction of foreign investments. If the international budget shows a tendency to excessive imports, it may raise the barriers; if there is a tendency to excessive exports, it may lower the barriers. If the volume of foreign loans appears to be abnormally large, it will cause the investment houses to curtail them. If the loans are abnormally small, and the export trades are suffering in consequence, it will through guaranties or direct public financing expand foreign credits. These are, of course, details suggested to illustrate the point, which is that in a modern economy tariffs and foreign credits can and should be treated as instruments for keeping the budget of international payments in approximate balance. For only by doing this can private judgment be made to operate within reasonably safe limits.

I hope I have given enough concrete illustrations to demonstrate that a system of free collectivism, operating through a method of compensatory control, need not lack the means for powerful intervention in the operation of the capitalist order. Some of the difficulties of such a system I shall attempt to discuss later. For the moment I should like to dwell upon certain of its general characteristics which, in my opinion, make it not only a feasible but an attractive alternative to a directed economy and a regime of absolute collectivism.

3. THE TWO SYSTEMS COMPARED

To anyone steeped in the tradition of *laissez-faire* there may at first appear to be little difference between a directed economy and a compensated economy. Both call for the exercise of vast powers by the state, for continual and deep intervention in the economic order. Both are collectivist in that both rest on a recognition that the standard of life and the management of the economy as a whole are a collective responsibility and not solely an individual one.

Yet between the two conceptions there is a radical difference. Under absolute collectivism, be it of the fascist or communist type, the government is in fact the master, the citizen a subject and a servant. Under free collectivism, the government in its economic activities is in effect a gigantic

public corporation which stands ready to throw its weight into the scales wherever and whenever it is necessary to redress the balance of private transactions. The initiative, throughout the whole realm of production and consumption, excepting only public utilities and public works reserved as instruments of compensatory control, remains in individual hands.

This initiative is subjected not to an official plan and to administrative orders, but to the play of prices representing the judgments and preferences of producers, consumers, and investors. Within extremely wide limits enterprise is free. Men decide for themselves, guided chiefly by their estimates of the profits they may obtain, what they will produce; guided chiefly by the opportunities available and their own aptitudes, they decide at what they will work; guided by their needs and tastes in relation to their incomes, they decide what they will consume and how much they will save.

These choices are not made for them by officials exercising the power of the state. Thus economic progress is determined by technological advance, by private enterprise, and by what might be described as the perpetual plebiscite of the markets. The object of the state's intervention is not to supplant this system but to preserve it by remedying its abuses and correcting its errors. The intervention takes the form not of commands and prohibitions but of compensatory measures.

The purpose of the intervention is not to impose an official pattern upon all enterprise, but to maintain a working, moving equilibrium in the complex of private transactions. In substance, the state undertakes to counteract the mass errors of the individualist crowd by doing the opposite of what the crowd is doing; it saves when the crowd is spending too much; it borrows when the crowd is saving too much; it economizes when the crowd is extravagant, and it spends when the crowd is afraid to spend; it contracts when the crowd is expansive; it becomes enterprising when the crowd is depressed; it buys in sellers' markets and sells in buyers' markets; it taxes when the crowd is borrowing, and borrows when the crowd is hoarding; it becomes an employer when there is private unemployment, and it shuts down when there is work for all. Its ideal is to prevent excess; its general principle is not to impose a social order conceived by officials but to maintain in a changing order, worked out by the initiative and energy of individuals, a golden mean.

In the practice of statesmanship the compensatory method is, I believe, an epoch-making invention. For generations it has been supposed that an exclusive choice had to be made between collectivism and the freedom of private initiative, that the management of affairs had either to be left to individuals or assumed by the state. Whichever way one looked at these alternatives, the prospect was unsatisfactory. To concentrate initiative in officials was a certain way to kill initiative and liberty and to establish a state which in the ordinary course of events was bound to be despotic and inefficient. On the other hand, to let individualism run loose

in a complex social order was to let it run wild and thus to produce disorder and injustice.

This dilemma is being resolved not by the arguments of collectivists and individualists but by the gradual uncovering of a new social principle. It provides both for individual initiative and collective initiative. The one is not the substitute for the other. The two are complementary. It is the method of freedom. The authority of the government is used to assist men in maintaining the security of an ordered life. The state, though it is powerful, is not the master of the people, but remains, as it must where they have liberty, their servant.

95. FEDERAL POWER IN LABOR DISPUTES

The use of the commerce clause as a basis upon which the federal government may intervene in labor disputes is seen in the opinion of the Supreme Court of the United States in the case of *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U. S. 1 (1937), from which the following excerpt is taken. In addition to the readings in this chapter, the commerce power is discussed in reading no. 34, *supra*.

N. L. R. B. v. JONES & LAUGHLIN STEEL CORP.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

In a proceeding under the National Labor Relation Act of 1935, the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power. 83 F. (2d) 998. We granted certiorari.

The scheme of the National Labor Relations Act—which is too long to be quoted in full—may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial

by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. There follows a declaration that it is the policy of the United States to eliminate these causes of obstruction to the free flow of commerce. The Act then defines the terms it uses, including the terms "commerce" and "affecting commerce." § 2. It creates the National Labor Relations Board and prescribes its organization. §§ 3-6. It sets forth the right of employees to self-organization and to bargain collectively through representatives of their own choosing. § 7. It defines "unfair labor practices." § 8. It lays down rules as to the representation of employees for the purpose of collective bargaining. § 9. The Board is empowered to prevent the described unfair labor practices affecting commerce and the Act prescribes the procedure to that end. The Board is authorized to petition designated courts to secure the enforcement of its orders. The findings of the Board as to the facts, if supported by evidence, are to be conclusive. If either party on application to the court shows that additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearings before the Board, the court may order the additional evidence to be taken. Any person aggrieved by a final order of the Board may obtain a review in the designated courts with the same procedure as in the case of an application by the Board for the enforcement of its order. § 10. The Board has broad powers of investigation. § 11. Interference with members of the Board or its agents in the performance of their duties is punishable by fine and imprisonment. § 12. Nothing in the Act is to be construed to interfere with the right to strike. § 13. There is a separability clause to the effect that if any provision of the Act or its application to any person or circumstances shall be held invalid, the remainder of the Act or its application to other persons or circumstances shall not be affected. § 15. The particular provisions which are involved in the instant case will be considered more in detail in the course of the discussion.

The procedure in the instant case followed the statute. The labor union filed with the Board its verified charge. The Board thereupon issued its complaint against the respondent alleging that its action in discharging the employees in question constituted unfair labor practices affecting commerce within the meaning of § 8, subdivisions (1) and (3), and § 2, subdivisions (6) and (7) of the Act. Respondent, appearing specially for the purpose of objecting to the jurisdiction of the Board, filed its answer. Respondent admitted the discharges, but alleged that they were made because of inefficiency or violation of rules or for other good reasons and were not ascribable to union membership or activities. As an affirmative defense respondent challenged the constitutional validity of the statute and its applicability in the instant case. Notice of hearing was given and respondent appeared by counsel. The Board first took up the issue of jurisdiction and evidence was presented by both the Board and the respondent. Respondent then moved to dismiss the complaint for lack of

jurisdiction; and, on denial of that motion, respondent in accordance with its special appearance withdrew from further participation in the hearing. The Board received evidence upon the merits and at its close made its findings and order.

Contesting the ruling of the Board, the respondent argues (1) that the Act is in reality a regulation of labor relations and not of interstate commerce; (2) that the Act can have no application to the respondent's relations with its production employees because they are not subject to regulation by the federal government; and (3) that the provisions of the Act violate § 2 of Article III and the Fifth and Seventh Amendments of the Constitution of the United States.

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pennsylvania. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries—nineteen in number—it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central and Baltimore and Ohio Railroad systems. It owns the Aliquippa and Southern Railroad Company which connects the Aliquippa works with the Pittsburgh and Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis,—to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semi-finished materials sent from its works. Through one of its wholly-owned subsidiaries it owns, leases and operates stores, warehouses and yards for the distribution of equipment and supplies for drilling and operating oil and gas wells and for pipe lines, refineries and pumping stations. It has sales offices in twenty cities in the United States and a wholly-owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 per cent. of its product is shipped out of Pennsylvania.

Summarizing these operations, the Labor Board concluded that the

works in Pittsburgh and Aliquippa "might be likened to the heart of a self-contained, highly integrated body. They draw in the raw materials from Michigan, Minnesota, West Virginia, Pennsylvania in part through arteries and by means controlled by the respondent; they transform the materials and then pump them out to all parts of the nation through the vast mechanism which the respondent has elaborated."

To carry on the activities of the entire steel industry, 33,000 men mine ore, 44,000 men mine coal, 4,000 men quarry limestone, 16,000 men manufacture coke, 343,000 men manufacture steel, and 83,000 men transport its product. Respondent has about 10,000 employees in its Aliquippa plant, which is located in a community of about 30,000 persons.

Respondent points to evidence that the Aliquippa plant, in which the discharged men were employed, contains complete facilities for the production of finished and semi-finished iron and steel products from raw materials; that its works consist primarily of a by-product coke plant for the production of coke; blast furnaces for the production of pig iron; open hearth furnaces and Bessemer converters for the production of steel; blooming mills for the reduction of steel ingots into smaller shapes; and a number of finishing mills such as structural mills, rod mills, wire mills and the like. In addition there are other buildings, structures and equipment, storage yards, docks and intra-plant storage system. Respondent's operations at these works are carried on in two distinct stages, the first being the conversion of raw materials into pig iron and the second being the manufacture of semi-finished and finished iron and steel products; and in both cases the operations result in substantially changing the character, utility and value of the materials wrought upon, which is apparent from the nature and extent of the processes to which they are subjected and which respondent fully describes. Respondent also directs attention to the fact that the iron ore which is procured from mines in Minnesota and Michigan and transported to respondent's plant is stored in stock piles for future use, the amount of ore in storage varying with the season but usually being enough to maintain operations from nine to ten months; that the coal which is procured from the mines of a subsidiary located in Pennsylvania and taken to the plant at Aliquippa is there, like ore, stored for future use, approximately two to three months' supply of coal being always on hand; and that the limestone which is obtained in Pennsylvania and West Virginia is also stored in amounts usually adequate to run the blast furnaces for a few weeks. Various details of operation, transportation, and distribution are also mentioned which for the present purpose it is not necessary to detail.

Practically all the factual evidence in the case, except that which dealt with the nature of respondent's business concerned its relations with the employees in the Aliquippa plant whose discharge was the subject of the complaint. These employees were active leaders in the labor union. Several were officers and others were leaders of particular groups. Two of

the employees were motor inspectors; one was a tractor driver; three were crane operators; one was a washer in the coke plant; and three were laborers. Three other employees were mentioned in the complaint but it was withdrawn as to one of them and no evidence was heard on the action taken with respect to the other two.

While respondent criticises the evidence and the attitude of the Board, which is described as being hostile toward employers and particularly toward those who insisted upon their constitutional rights, respondent did not take advantage of its opportunity to present evidence to refute that which was offered to show discrimination and coercion. In this situation, the record presents no ground for setting aside the order of the Board so far as the facts pertaining to the circumstances and purpose of the discharge of the employees are concerned. Upon that point it is sufficient to say that the evidence supports the findings of the Board that respondent discharged these men "because of their union activity and for the purpose of discouraging membership in the union." We turn to the questions of law which respondent urges in contesting the validity and application of the Act.

First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble (section one) and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *Schechter Corp. v. United States*, 295 U. S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. *Id.*

But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as be-

tween two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. . . .

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in § 10 (a), which provides:

"Sec 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The Act specifically defines the "commerce" to which it refers (§ 2 (6)):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce" (§ 2 (7)):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. . . . Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second The unfair labor practices in question.—The unfair labor practices found by the Board are those defined in § 8, subdivisions (1) and (3). These provide:

Sec. 8. It shall be an unfair labor practice for an employer—

“(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”

“(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .”

Section 8, subdivision (1), refers to § 7, which is as follows:

“Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”

Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, “instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.” *Texas & N. O. R. Co. v. Railway Clerks*, *supra*. We have reasserted the same principle in sustaining the application of the Railway Labor Act as

amended in 1934. *Virginia Railway Co. v. System Federation*, No. 40, *supra*.

Third. The application of the Act to employees engaged in production.—The principle involved.—Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. . . .

The Government distinguishes these cases. The various parts of respondent's enterprise are described as interdependent and as thus involving "a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business." It is urged that these activities constitute a "stream" or "flow" of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire movement. Reference is made to our decision sustaining the Packers and Stockyards Act. *Stafford v. Wallace*, 258 U. S. 495. The Court found that the stockyards were but a "throat" through which the current of commerce flowed and the transactions which there occurred could not be separated from that movement. Hence the sales at the stockyards were not regarded as merely local transactions, for while they created "a local change of title" they did not "stop the flow," but merely changed the private interests in the subject of the current. Distinguishing the cases which upheld the power of the State to impose a non-discriminatory tax upon property which the owner intended to transport to another State, but which was not in actual transit and was held within the State subject to the disposition of the owner, the Court remarked: "The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority." *Id.*, p. 526. See *Minnesota v. Blasius*, 290 U. S. 1, 8. Applying the doctrine of *Stafford v. Wallace*, *supra*, the Court sustained the Grain Futures Act of 1922 with respect to transactions on the Chicago Board of Trade, although these transactions were "not in and of themselves interstate commerce." Congress had found that they had become "a constantly recurring burden and obstruction to that commerce." . . .

Respondent contends that the instant case presents material distinctions. Respondent says that the Aliquippa plant is extensive in size and represents a large investment in buildings, machinery and equipment. The raw materials which are brought to the plant are delayed for long periods and, after being subjected to manufacturing processes, "are changed substantially as to character, utility and value." The finished products which emerge "are to a large extent manufactured without reference to pre-existing orders and contracts and are entirely different from

the raw materials which enter at the other end." Hence respondent argues that "If importation and exportation in interstate commerce do not singly transfer purely local activities into the field of congressional regulation, it should follow that their combination would not alter the local situation." . . .

We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*Mobile County v. Kimball*, 102 U. S. 691, 696, 697); "to foster, protect, control and restrain." *Second Employers' Liability Cases*, *supra*, p. 47. . . . That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." . . . Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corp. v. United States*, *supra*. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree. As the Court said in *Chicago Board of Trade v. Olsen*, *supra*, p. 37, repeating what had been said in *Stafford v. Wallace*, *supra*: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it."

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. *Shreveport Case*, 234 U. S. 342, 351, 352; *Wisconsin Railroad Comm'n v. Chicago, B. & Q.*

R. Co., 257 U. S. 563, 588. It is manifest that intrastate rates deal *primarily* with a local activity. But in rate-making they bear such a close relation to interstate rates that effective control of the one must embrace some control over the other. *Id.* Under the Transportation Act, 1920, Congress went so far as to authorize the Interstate Commerce Commission to establish a state-wide level of intrastate rates in order to prevent an unjust discrimination against interstate commerce. *Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co.*, *supra*; *Florida v. United States*, 282 U. S. 194, 210, 211. Other illustrations are found in the broad requirements of the Safety Appliance Act and the Hours of Service Act. *Southern Railway Co. v. United States*, 222 U. S. 20; *Baltimore & Ohio R. Co. v. Interstate Commerce Comm'n*, 221 U. S. 612. It is said that this exercise of federal power has relation to the maintenance of adequate instrumentalities of interstate commerce. But the agency is not superior to the commerce which uses it. The protective power extends to the former because it exists as to the latter.

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the federal Anti-Trust Act. In the *Standard Oil* and *American Tobacco* cases, 221 U. S. 1, 106, that statute was applied to combinations of employers engaged in productive industry. Counsel for the offending corporations strongly urged that the Sherman Act had no application because the acts complained of were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, but primarily affected manufacturing and not commerce. 221 U. S. pp. 5, 125. Counsel relied upon the decision in *United States v. Knight Co.*, 156 U. S. 1. The Court stated their contention as follows: "That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the States." And the Court summarily dismissed the contention in these words: "But all the structure upon which this argument proceeds is based upon the decision in *United States v. E. C. Knight Co.*, 156 U. S. 1. The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice" (citing cases). 221 U. S. pp. 68, 69.

Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. . . . The decisions dealing with the question of that application illustrate both the principle and its limitation. Thus, in the first *Coronado* case, the Court held that mining

was not interstate commerce, that the power of Congress did not extend to its regulation as such, and that it had not been shown that the activities there involved—a local strike—brought them within the provisions of the Anti-Trust Act, notwithstanding the broad terms of that statute. A similar conclusion was reached in *United Leather Workers v. Herkert & Meisel Trunk Co.*, *supra*, *Industrial Association v. United States*, *supra*, and *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, 107. But in the first *Coronado* case the Court also said that “if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint.” 259 U. S. p. 408. And in the second *Coronado* case the Court ruled that while the mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce, nevertheless when the “intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.” 268 U. S. p. 310. And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees’ conduct. *Industrial Association v. United States*, 268 U. S. p. 81. What was absent from the evidence in the first *Coronado* case appeared in the second and the Act was accordingly applied to the mining employees.

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case, *supra*, we found that the effect there was so remote as to be beyond the federal power. To find “immediacy or directness” there was to find it “almost everywhere,” a result inconsistent with the maintenance of our federal system. In the *Carter* case, *supra*, the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

Fourth. Effects of the unfair labor practice in respondent's enterprise.—Giving full weight to respondent's contention with respect to a break in the complete continuity of the “stream of commerce” by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum.

Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. The opinion in the case of *Virginian Railway Co. v. System Federation, No. 40, supra*, points out that, in the case of carriers, experience has shown that before the amendment, of 1934, of the Railway Labor Act "when there was no dispute as to the organizations authorized to represent the employees and when there was a willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided." That, on the other hand, "a prolific source of dispute had been the maintenance by the railroad of company unions and the denial by railway management of the authority of representatives chosen by their employees." The opinion in that case also points to the large measure of success of the labor policy embodied in the Railway Labor Act. But with respect to the appropriateness of the recognition of self-organization and representation in the promotion of peace, the question is not essentially different in the case of employees in industries of such a character that interstate commerce is put in jeopardy from the case of employees of transportation companies. And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!

These questions have frequently engaged the attention of Congress and have been the subject of many inquiries. The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel strike of 1919-1920 with its far-reaching consequences. The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of the future and like dangers to interstate commerce which Congress was entitled to

foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.

Fifth. The means which the Act employs.—Questions under the due process clause and other constitutional restrictions.—Respondent asserts its right to conduct its business in an orderly manner without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *Texas & N. O. R. Co. v. Railway Clerks, supra*; *Virginian Railway Co. v. System Federation, No. 40*. Restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious. The provision of § 9 (a) that representatives, for the purpose of collective bargaining, of the majority of the employees in an appropriate unit shall be the exclusive representatives of all the employees in that unit, imposes upon the respondent only the duty of conferring and negotiating with the authorized representatives of its employees for the purpose of settling a labor dispute. This provision has its analogue in § 2, Ninth, of the Railway Labor Act which was under consideration in *Virginian Railway Co. v. System Federation, No. 40, supra*. The decree which we affirmed in that case required the Railway Company to treat with the representative chosen by the employees and also to refrain from entering into collective labor agreements with anyone other than their true representative as ascertained in accordance with the provisions of the Act. We said that the obligation to treat with the true representative was exclusive and hence imposed the negative duty to treat with no other. We also pointed out that, as conceded by the Government, the injunction against the Company's entering into any contract concerning rules, rates of pay and working conditions except with a chosen representative was "designed only to prevent collective bargaining with anyone purporting to represent employees" other than the representative they had selected. It was taken "to prohibit the negotiation of labor contracts generally applicable to employees" in the described unit with any other representative than the one so chosen, "but not as precluding such individual contracts" as the Company might "elect to make directly with individual employees." We think this construction also applies to § 9 (a) of the National Labor Relations Act.

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." The Act expressly provides in § 9 (a) that any individual

employee or a group of employees shall have the right at any time to present grievances to their employer. The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. As we said in *Texas & N. O. R. Co. v. Railway Clerks*, *supra*, and repeated in *Virginian Railway Co. v. System Federation*, No. 40, *supra*, the cases of *Adair v. United States*, 208 U. S. 161, and *Coppage v. Kansas*, 236 U. S. 1, are inapplicable to legislation of this character. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation with full opportunity to show the facts. It would seem that when employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge.

The Act has been criticised as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to provide a more comprehensive plan,—with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid “cautious advance, step by step,” in dealing with the evils which are exhibited in activities within the range of legislative power. . . . The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits.

The procedural provisions of the Act are assailed. But these provisions, as we construe them, do not offend against the constitutional requirements governing the creation and action of administrative bodies. See *Interstate Commerce Comm’n v. Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional

right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. It is not necessary to repeat these rules which have frequently been declared. None of them appears to have been transgressed in the instant case. Respondent was notified and heard. It had opportunity to meet the charge of unfair labor practices upon the merits, and by withdrawing from the hearing it declined to avail itself of that opportunity. The facts found by the Board support its order and the evidence supports the findings. Respondent has no just ground for complaint on this score.

The order of the Board required the reinstatement of the employees who were found to have been discharged because of their "union activity" and for the purpose of "discouraging membership in the union." That requirement was authorized by the Act. § 10 (c). In *Texas & N. O. R. Co. v. Railway Clerks*, *supra*, a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service, of employees discharged in violation of the provisions of that Act, was thus a sanction imposed in the enforcement of a judicial decree. We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety.

Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. This part of the order was also authorized by the Act. § 10 (c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. . . . Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. *Clark v. Wooster*, 119 U. S. 322, 325; *Pease v. Rathbun-Jones Engineering Co.*, 243 U. S. 273, 279. It does not apply where the proceeding is not in the nature of a suit at common law. *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 537.

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are

remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

96. CONTROLLING THE MANUFACTURING PROCESS

Indirect federal control of the manufacturing process is seen in the power of Congress to prohibit the shipment in interstate commerce of products not manufactured in accordance with the Fair Labor Standards Act. The reading below is taken from the opinion of the Supreme Court of the United States in the case of *United States v. Darby*, 312 U. S. 100 (1941).

UNITED STATES v. DARBY

MR. JUSTICE STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, *first*, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second*, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods to-wit, lumber, for 'interstate commerce.'"

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The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in § 2 (a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess., Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so pro-

duced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with "Industry Committees" appointed by him.

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The prohibition of shipment of the proscribed goods in interstate commerce. Section 15 (a) (1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by § 6 and § 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." *Gibbons v. Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. . . . It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, *Lottery Case*, *supra*; *Hipolite Egg Co. v. United States*, 220 U. S. 45; cf. *Hoke v. United States*, *supra*; stolen articles, *Brooks v. United States*, 267 U. S. 432; kidnapped persons, *Gooch v. United States*, 297 U. S. 124, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the proscribed articles from interstate commerce in aid of state regulation as in *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, *supra*, but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in

itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons v. Ogden*, *supra*, 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, *supra*. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. . . .

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. . . .

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray v. United States*, 195 U. S. 27; *Sonzinsky v. United States*, 300 U. S. 506, 513 and cases cited. "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." *Veazie Bank v. Fenno*, 8 Wall. 533. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden*, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*, 247 U. S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion

there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . . And finally we have declared “The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce.” *United States v. Rock Royal Co-operative*, 307 U. S. 533, 569.

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Validity of the wage and hour requirements. Section 15 (a) (2) and §§ 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellee’s employees are not alleged to be “engaged in interstate commerce” the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under § 15 (a) (2) as they were construed below, constitute “production for commerce” within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase “produced for interstate commerce,” it embraces at least the case where an employer engaged, as is appellee, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it.

Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber; cloth, furniture or the like which later move in interstate rather than intrastate commerce. Cf. *United States v. New York Central R. Co.*, 272 U. S. 457, 464.

The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, S. Rept. No. 884, 75th Cong. 1st Sess., pp. 7 and 8; H. Rept. No. 2738, 75th Cong. 3d Sess., p. 17, that the "production for commerce" intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland*, 4 Wheat. 316, 421. Cf. *United States v. Ferger*, 250 U. S. 199.

While this Court has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. *Minnesota Rate Cases*, 230 U. S. 352, 398 *et seq.*, and case cited; 410 *et seq.*, and cases cited. In the absence of Congressional legislation on the subject state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. . . .

But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. See *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466. A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 38,

40; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 604, and cases cited. But long before the adoption of the National Labor Relations Act this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it.

In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power. See *United States v. Ferger*, *supra*; *Virginian Ry. Co. v. Federation*, 300 U. S. 515, 553.

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. . . . A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. . . . Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. . . . It may prohibit the removal, at destination, of labels required by the Pure Food & Drugs Act to be affixed to articles transported in interstate commerce. . . . And we have recently held that Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. . . .

We think also that § 15 (a) (2), now under consideration, is sustainable independently of § 15 (a) (1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the

Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as "unfair," as the Clayton Act has condemned other "unfair methods of competition" made effective through interstate commerce. . . .

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. . . .

The means adopted by § 15 (a) (2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. See *Currin v. Wallace*, *supra*, 11. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. Cf. *National Labor Relations Board v. Fainblatt*, *supra*, 606.

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Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. See e.g., II Elliot's Debates, 123, 131; III *id.* 450, 464, 600; IV *id.* 140, 149; I Annals of Congress, 432, 761, 767-768; Story, Commentaries on the Constitution, §§ 1907-1908.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort

to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. . . .

Validity of the requirement of records of wages and hours. § 15 (a) (5) and § 11 (c). These requirements are incidental to those for the prescribed wages and hours, and hence validity of the former turns on validity of the latter. Since, as we have held, Congress may require production for interstate commerce to conform to those conditions, it may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of the intrastate transaction is an appropriate means to the legitimate end. . . .

Validity of the wage and hour provisions under the Fifth Amendment. Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of "not less than one and one-half times the regular rate" at which the worker is employed. Since our decision in *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . .

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. *Nash v. United States*, 229 U. S. 373, 377.

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Reversed.

97. CONTROLLING AGRICULTURAL PRODUCTION

Indirect federal control of agricultural production may be seen in the power of Congress to control interstate commerce "at the throat" as indicated in the opinion of the Supreme Court of the United States in the case of *Mulford v. Smith*, 307 U. S. 38 (1939). Whether the control need be "indirect" may be questioned after reading the following excerpt from the opinion of the court in *Wickard, Secretary of Agriculture, et al. v. Filburn*, 317 U. S. 111 (1942).

WICKARD, SECRETARY OF AGRICULTURE, et al. v. FILBURN

MR. JUSTICE JACKSON delivered the opinion of the Court.

The appellee filed his complaint against the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State

Agricultural Conservation Committee for Ohio. He sought to enjoin enforcement against himself of the marketing penalty imposed by the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sustainable under the Commerce Clause or consistent with the Due Process Clause of the Fifth Amendment.

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The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940, before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or \$117.11 in all. The appellee has not paid the penalty and he has not postponed or avoided it by storing the excess under regulations of the Secretary of Agriculture, or by delivering it up to the Secretary. The Committee, therefore, refused him a marketing card, which was, under the terms of Regulations promulgated by the Secretary, necessary to protect a buyer from liability to the penalty and upon its protecting lien.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. Loans and payments to wheat farmers are authorized in stated circumstances.

The Act further provides that whenever it appears that the total

supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 per cent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing of wheat. Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota, to determine whether they favor or oppose it; and, if more than one-third of the farmers voting in the referendum do oppose, the Secretary must, prior to the effective date of the quota, by proclamation suspend its operation.

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Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of Agriculture, 81 per cent of those voting favored the marketing quota, with 19 per cent opposed.

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It is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States v. Darby*, 312 U. S. 100, sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives, so that as related to wheat, in addition to its conventional meaning, it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as "available for marketing" as so defined, and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most "indirect." In answer the Government argues that the statute regulates neither production nor

consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden*, 9 Wheat. 1, 194-195. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes. *Id.* at 197.

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.

It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the

interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. *United States v. Knight Co.*, 156 U. S. 1. These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*, *supra*.

Not long after the decision of *United States v. Knight Co.*, *supra*, Mr. Justice Holmes, in sustaining the exercise of national power over intrastate activity, stated for the Court that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 375, 398. It was soon demonstrated that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation. In some cases sustaining the exercise of federal power over intrastate matters the term "direct" was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with "substantial" or "material"; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause.

In the *Shreveport Rate Cases*, 234 U. S. 342, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Id.* at 351.

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, exemplified by this statement, has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production," nor can consideration of its economic effects be foreclosed by calling them "indirect." The present Chief Justice has said in summary of the present state of the law: "The commerce power is not confined in its exercise to

the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119.

Whether the subject of the regulation in question was "production," "consumption," or "marketing" is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carry-over.

The wheat industry has been a problem industry for some years. Largely as a result of increased foreign production and import restrictions, annual exports of wheat and flour from the United States during the ten-year period ending in 1940 averaged less than 10 per cent of total production, while during the 1920's they averaged more than 25 per cent. The decline in the export trade has left a large surplus in production which, in connection with an abnormally large supply of wheat and other grains in recent years, caused congestion in a number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion.

Many countries, both importing and exporting, have sought to modify the impact of the world market conditions on their own economy. Im-

porting countries have taken measures to stimulate production and self-sufficiency. The four large exporting countries of Argentina, Australia, Canada, and the United States have all undertaken various programs for the relief of growers. Such measures have been designed, in part at least, to protect the domestic price received by producers. Such plans have generally evolved towards control by the central government.

In the absence of regulation, the price of wheat in the United States would be much affected by world conditions. During 1941, producers who coöperated with the Agricultural Adjustment program received an average price on the farm of about \$1.16 a bushel, as compared with the world market price of 40 cents a bushel.

Differences in farming conditions, however, make these benefits mean different things to different wheat growers. There are several large areas of specialization in wheat, and the concentration on this crop reaches 27 per cent of the crop land, and the average harvest runs as high as 155 acres. Except for some use of wheat as stock feed and for seed, the practice is to sell the crop for cash. Wheat from such areas constitutes the bulk of the interstate commerce therein.

On the other hand, in some New England states less than one per cent of the crop land is devoted to wheat, and the average harvest is less than five acres per farm. In 1940 the average percentage of the total wheat production that was sold in each state, as measured by value, ranged from 29 per cent thereof in Wisconsin to 90 per cent in Washington. Except in regions of large-scale production, wheat is usually grown in rotation with other crops; for a nurse crop for grass seeding; and as a cover crop to prevent soil erosion and leaching. Some is sold, some kept for seed, and a percentage of the total production much larger than in areas of specialization is consumed on the farm and grown for such purpose. Such farmers, while growing some wheat, may even find the balance of their interest on the consumer's side.

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. *Labor Board v. Fainblatt*, 306 U. S. 601, 606 *et seq.*; *United States v. Darby*, *supra*, at 123.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

98. INSURANCE IS COMMERCE

In 1944, the Supreme Court of the United States made a significant ruling as to the relationship of the insurance business to interstate commerce, as will be seen in the following excerpt from the opinion of the Court in *United States v. South-Eastern Underwriters Association et al.*, 322 U. S. 533 (1944), delivered by Mr. Justice Black.

U. S. v. SOUTH-EASTERN UNDERWRITERS ASSOCIATION et al.

Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word "commerce" as used in the Commerce Clause does not

include a business such as insurance would do just that. Whatever other meanings "commerce" may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business in which persons bought and sold, bargained and contracted. And this meaning has persisted to modern times. Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate "Commerce among the several States" does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.

The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce. Its total assets exceed \$37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States. Its annual premium receipts exceed \$6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade. Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state.

That the fire insurance transactions alleged to have been restrained and monopolized by appellees fit the above described pattern of the na-

tional insurance trade is shown by the indictment before us. Of the nearly 200 combining companies, chartered in various states and foreign countries, only 18 maintained their home offices in one of the six states in which the S. E. U. A. operated; and 127 had headquarters in either New York, Pennsylvania, or Connecticut. During the period 1931-1941 a total of \$488,000,000 in premiums was collected by local agents in the six states, most of which was transmitted to home offices in other states; while during the same period \$215,000,000 in losses was paid by checks or drafts sent from the home offices to the companies' local agents for delivery to the policyholders. Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operations. The insurance sold by members of S. E. U. A. covered not only all kinds of fixed local properties, but also such properties as steamboats, tugs, ferries, shipyards, warehouses, terminals, trucks, busses, railroad equipment and rolling stock, and movable goods of all types carried in interstate and foreign commerce by every media of transportation.

Despite all of this, despite the fact that most persons, speaking from common knowledge, would instantly say that of course such a business is engaged in trade and commerce, the District Court felt compelled by decisions of this Court to conclude that the insurance business can never be trade or commerce within the meaning of the Commerce Clause. We must therefore consider these decisions.

In 1869 this Court held, in sustaining a statute of Virginia which regulated foreign insurance companies, that the statute did not offend the Commerce Clause because "issuing a policy of insurance is not a transaction of commerce." *Paul v. Virginia*, 8 Wall. 168, 183. Since then, in similar cases, this statement has been repeated, and has been broadened. In *Hooper v. California*, 155 U. S. 648, 654, 655, decided in 1895, the *Paul* statement was reaffirmed, and the Court added that, "The business of insurance is not commerce." In 1913 the New York Life Insurance Company, protesting against a Montana tax, challenged these broad statements, strongly urging that its business, at least, was so conducted as to be engaged in interstate commerce. But the Court again approved the *Paul* statement and held against the company, saying that "contracts of insurance are not commerce at all, neither state nor interstate." *New York Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 503-504, 510.

In all cases in which the Court has relied upon the proposition that "the business of insurance is not commerce," its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. As early as 1866 the insurance trade, though still in its infancy, was subject to widespread

abuses. To meet the imperative need for correction of these abuses the various state legislatures; including that of Virginia, passed regulatory legislation. *Paul v. Virginia* upheld one of Virginia's statutes. To uphold insurance laws of other states, including tax laws, *Paul v. Virginia's* generalization and reasoning have been consistently adhered to.

Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause. Furthermore, the reasons given in support of the generalization that "the business of insurance is not commerce" and can never be conducted so as to constitute "Commerce among the States" are inconsistent with many decisions of this Court which have upheld federal statutes regulating interstate commerce under the Commerce Clause.

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The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. *Lottery Case*, 188 U. S. 321, 355. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, *Hoke v. United States*, 227 U. S. 308, 320-323; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States v. Simpson*, 252 U. S. 465; to drive a stolen automobile from Iowa to South Dakota, *Brooks v. United States*, 267 U. S. 432, 436-439. Diseased cattle ranging between Georgia and Florida are in commerce, *Thornton v. United States*, 271 U. S. 414, 425; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation, *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 11. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation;—activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many

states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines.

The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition. The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189-190: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . ." Commerce is interstate, he said, when it "concerns more States than one." *Id.*, 194. No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause. To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the states.

The power confined to Congress by the Commerce Clause is declared in *The Federalist* to be for the purpose of securing the "maintenance of harmony and proper intercourse among the States." But its purpose is not confined to empowering Congress with the negative authority to legislate against state regulations of commerce deemed inimical to the national interest. The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.

Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power, as held by this Court from the beginning, is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.

99. INTERSTATE RAILWAYS

Complexities and conflicting interests involved in governmental regulation of interstate railways are reflected in the following reading.¹ David A. Munro, author of this article, was founder and original editor of *Space and Time*, has written for *Business Week*, the *New Yorker*, *Pageant*, and the information section of OPA.

¹ "Civil War Splits America's Railroad Empire," by David A. Munro in *New Republic*, January 20, 1947; used by permission.

CIVIL WAR SPLITS AMERICA'S RAILROAD EMPIRE

by David A. Munro

At the corner of Broad and Wall, Manhattan, stands a building over whose door is written no inscription and whose dirt-smudged classic lines testify to a grandeur that needs no identifying symbol or statement. This is the House of Morgan; from its august halls and the baronial offices of its rulers and allies run those invisible strings of control which bind the life-lines of American economic activity—the railroads.

"All roads lead to Rome," said a railroadman, testifying recently before the Interstate Commerce Commission; "I mean to The Corner—J. P. Morgan & Company." The man who spoke was an undersized, graying, blue-eyed and generally unprepossessing figure, a railroader by choice, an accountant and financier by profession. His name was Robert R. Young, the first man to challenge Morgan suzerainty over American roads in a generation.

The decisions of the Morgan partners and their allies—the considered nod, the gentlemanly refusal, the shrewd figuring of percentages—run like electric impulses over the wires and roadbeds of the great railways of America. They run from the great terminals in New York over the shining rails, across the Alleghenies to all the grimy industrial towns of the Midwest; they cross the saddle of the Rockies along the roaring trunk lines to the Pacific Coast; they run down the coastal seaboard to the cotton states, holding them in economic bondage. The empire is invisible, but it is a basic entity of American life.

Upon this mighty empire, Robert Young has declared war. This is an act of daring that may change the substance of American life. Young has his allies: the Halsey, Stuart banking group of Chicago; rich Cyrus Eaton of Otis & Company of Cleveland; Allan P. Kirby, the Woolworth heir who put up most of the money which brought Young into railroading; and the three strategically placed railroads which Young himself now dominates—the coal-bearing Chesapeake & Ohio (tapping the mid-Allegheny mining country for the benefit of Midwest industry and the Eastern seaboard), the auto-hauling Pere Marquette (crisscrossing industrial Michigan) and the once rickety but now restored Nickel Plate (weaving diagonally through the richest areas of the Middle West in search of finished goods and produce, and thereby tying the northern and southern portions of Young's particular realm together).

Against Young, meanwhile, stand the big New York banks, the insurance companies, the Association of American Railroads and even—if one can go by its records to date—the Interstate Commerce Commission. For the past 10 years the war has been waged in the financial columns of the big-city newspapers and in sniping, bold-face advertisements splashed across the country. Up to now the public has stood apart, wondering what it is all about and tending to look on this as just another squabble among

the titans. Yet now the public is about to be treated to the strange spectacle of a railroad magnate aligning himself with a liberal, monopoly-hating Governor—Ellis Arnall of Georgia—in an open challenge to Wall Street.

Victory or defeat will affect every American in a dozen immediate ways: it will help determine the price he pays for his railroad ticket, the kind of car (whether new or old, comfortable or shabby) he travels in, the number of delays or stop-overs he may have to undergo and, more important, the question of whether he is to continue to be the helpless silent partner of big rail and banking combines in favoring one section and interest group of the country against another. The outcome of the present clash, in fact, will decide a great deal about the future of competitive enterprise in America. It will serve to show whether there is actually a future in competition or whether monopoly has closed in on us for good.

Crusader by accident

Robert Young, at 49, is both a conservative and a crusader. He wants to conserve—or rather to restore—competition, but he has to fight his business peers in order to do it. He left his Texas drawl behind when he quit the Panhandle cow country as a young man and came East to rise through accountancy into big-time finance (as a financial adviser of General Motors and president of the Wall Street house of Young, Kolbe & Company); but when he lets fly at his own former associates downtown, he talks the language of a Western maverick. He didn't know anything about railroading until he bought his way into it in middle life, winning control of a great hunk of the late Van Sweringen brothers' sprawling and bankrupt empire for a knock-down price; but since that time he has become transformed from a financier into a crack railroad operator, ardently taking the side of railroaders and the public against the money crowd which is sitting on top of both.

In spite of his prematurely aged look, there is something brisk and boyish about Young, and he says it is "fun" to run railroads—and fun to have a good fight. He had made a fortune before he ever got into the business, and had settled into a big mansion in Newport among all the other satisfied beneficiaries of the system. Yet he isn't satisfied now. He wants to show that he can run railroads better than Wall Street can run them. He wants to run more and more railroads (the Missouri Pacific, for whose control he is now fighting, and the New York Central, which he has coolly announced he is going to capture). He wants to run the great Pullman car-operating company, whose future is now before the Supreme Court. But every time he wants to run something, the downtown crowd pulls wires and tries to close in on him. The last thing one could call Young is a professional liberal; but he's on the people's side, nevertheless.

History of conquest

Long ago the banking Caesars of the roads divided their world into three parts for purposes of conquest and control: the Western Region

(trans-Mississippi); the Southern Region (south of the Ohio River and Virginia); and the remaining Eastern or Official Region where lie most of their tracks, their banks and their hearts. But rule by the Caesars brought order without stability. Bankers once acted for railroads, in the days when the great promoters—Vanderbilt, Gould, Gates, Hill, Morgan Sr., Fisk, Depew, all now remembered as the “robber barons”—were big owners of common stock in railroads. But during the present century bankers have figured increasingly as underwriting houses for railroad bonds. They don't own railroads, but they control them through such corporate devices as voting trusts and through friendly bankruptcies or reorganizations which save the bonds at the expense of the stock. But today's control is not necessarily exercised by bankers *for* railroads, which are legally the property of their common stockholders; it tends always to be exercised to protect the bond-issuing business.

Young charges that this shift in banker policy has cost the American investor \$1,080 million in securities already “irrevocably wiped out” and that the figure “is still rising.” He also charges the traditional banker control has committed the railroads to perpetuating long established ways of doing things and to all-out resistance against “progress.”

Anti-trust suits

This is the substance, too, of what the Justice Department's Anti-Trust Division feels about banker control. In three separate suits filed in the three railroad regions, the Division, accompanied by the state of Georgia, has moved to give the people “relief” from the railroad monopoly. The government seeks to restore competition and remove the squeeze. But the suits constituted a declaration of war to the House of Morgan and its feudal friends. The war is being waged not only in the courts, where the three suits are being heard, but in Congress, at the White House, before the ICC and in the press.

In the widening struggle, the Anti-Trust Division, Georgia's Governor Ellis Arnall and Senator Burton K. Wheeler have appeared as the chief political champions of the users; Robert Young is the leading railroadman champion of stockholders and customers.

Last week found Governor Arnall and railroader Young working out an eleventh-hour understanding (prior to the Governor's relinquishment of office to the newly elected Lieutenant Governor) that is expected to give the widest public emphasis to the difference between the program which Young stands for and the traditional banker policies that have put a dead hand alike on railroad securities and on improvements.

North v. South

The state of Georgia came into the railroad fight naturally enough. Ever since the first New England industrialists began to worry about the possible rise of industry in the South, there has been discrimination in

freight rates against the South in order to favor the producing regions in the North. Raw materials move cheaply on Southern rails, but finished products move at a high rate. It has therefore been advantageous to send raw materials North for processing. Foodstuffs, fuel, cotton and woodpulp produced in the South do not therefore support home industry as they might, and the Southern economy has fallen badly out of balance between agriculture and industry. The bankers who control railroad policy invented and maintained this discrimination because there is a community of interest between the men who sit on the boards of railroads and those who sit on the boards of Northern industries. Often, indeed, they are the same person. Meanwhile, the government's attempt to break this stranglehold was postponed by a wartime certificate to the Attorney General under which the railroads got themselves put beyond the reach of the Anti-Trust Division for the duration. But that didn't stop the state of Georgia. Governor Arnall named an anti-trust lawyer, William L. McGovern, Deputy Assistant Attorney General of Georgia, and the case was filed directly in the Supreme Court of the United States in March, 1945, with the Anti-Trust Division joining forces. Bob Young's Chesapeake & Ohio came into the Georgia case as a co-defendant because it was a party to "rate-bureau" deals and a member of the all-pervasive Association of American Railroads. Young insisted that he was an unwilling participant; he has since pulled all his railroads out of the AAR and seriously restricted their participation in any rate-making by local bureaus. Now, on the basis of his record and his promise to go straight, he has been given a clean bill of health by the state of Georgia.

This isn't the first time that Young got off scot-free upon a promise to go straight. Ten years ago, soon after Young had acquired the Alleghany Corporation (the holding company through which the Van Sweringens had dominated their railroad empire), Senator Burton K. Wheeler had him on the carpet to explain his transaction. Young admitted he had paid only \$254,295 of his own money for the control of an empire whose worth had been reckoned in billions. He agreed with Senator Wheeler that for one man to have so much power and to be subject to so many temptations "is a bad thing." The Senator shook a warning finger at Young and called Alleghany a banker-controlled monstrosity, a device by which the Van Sweringen brothers, who put this house of cards together in the twenties, had milked the railroads of millions of dollars. Wheeler called Young a "shoestring speculator." Young had to take it, but this may have been the turning point in his career. It was certainly the first time in his life that he denounced the ruling barons of Wall Street.

He told the Senate committee that he was going to clean up Alleghany quicker and better than the government could. He created a hum of excitement in Wall Street by telling the committee that he would remove banker control by opening new financing to competitive bidding. That meant defiance of the Morgans, who had looked on the former Van Sweringen roads as their own preserve.

Monopoly at work

According to Young, the Morgans and their friends tried every device to get him out, exerting their power through the Guaranty Trust Company (the trustee of Alleghany's bonds) in hopes of putting him off the corporation's board of directors, and rounding up proxies to pull his railroads out from under him. He did lose control of the Erie, he was threatened with loss of the Chesapeake & Ohio, and he has never yet been able to exert control over the Missouri Pacific, the biggest and most banker-ridden of the former Van Sweringen lines. Yet he managed to hold on to enough trackage to make him a big operator—only to find himself in danger of being sucked into a monopoly.

The railroad monopoly works in many ways. Its essential principle, of course, is to avoid competition between railroads while thwarting competition on the part of other means of transport.

This protective method begins at the top, where bankers keep re-shuffling railroad financial structures in such a way as to perpetuate their hold through the control of bond issues. And it goes on down to the bottom, where the furnisher of many items of equipment—even to freight-car doors and ice for refrigerator cars—enjoys a private monopoly protected by interlocked directorates and side payments.

One conspicuous result of this system is that some insiders' toes are likely to be stepped on by any suggested improvement in railroading. The icing-station monopoly would be endangered by introduction of mechanical refrigeration on cars. The freight-door monopoly would be endangered by any improvement in freight-car design. And the topside, controlling, bond-issuing monopoly would be endangered by a breakup of interlocking directorates, by competitive bidding for new security issues, by elimination of the voting-trustee system under which railroads are "voted" by bankers in defiance of their common-stock owners.

(The intimacy that has existed between many top railroad men and their friends in the equipment business was revealed some years ago when Walter P. Murphy, late president of the Standard Railway Equipment Manufacturing Company, at his death left legacies of \$100,000 each to M. W. Clement, president of the Pennsylvania; F. E. Williamson, president of the New York Central, and W. M. Jeffers, president of the Union Pacific, along with \$50,000 each to a long list of other men, including J. J. Pelley, president of the Association of American Railroads.)

Birth of the AAR

In its day-to-day operations, the rail monopoly works through the Association of American Railroads. The AAR is only 14 years old, but its methods are highly sophisticated. They were tested, and brought results, before the Association even came into existence.

Their pioneer was Joseph H. Hays, a Midwestern expert at building up organized pressure groups, who carried on a subtle campaign for

Western railroads against the rival interstate trucking interests. Under the "Western Agreement," Western railroads banded together and pressured legislatures until they were able to set up a kind of tariff wall along the Mississippi, where competitive transport was literally and figuratively held up.

The Western Association worked so well that a National Association was clearly in order, and—under the leadership of W. Averell Harriman, then chairman of the board of the Union Pacific and now Secretary of Commerce—it came into existence. But there was to be a new twist to this organization: as Harriman later admitted, his further objective was to subject Western railway-management decisions to review by Eastern financial interests. Harriman's plan set up a "committee of nine"—a top financial group empowered to form an organization "with teeth" and to assume command. Thomas W. Lamont, senior Morgan partner, was not among the nine, but according to the complaint filed by the state of Georgia, he became the active arbiter of ideas and strategy in the new association. Most of the men who headed up the association have since been indicted for conspiracy to violate the Sherman Act—but Averell Harriman, heir to the vast dominion of E. H. Harriman, has been spared.

How to kill competition

This is the outfit that Young is battling. One of the prizes in the battle is the control of the Pullman Company, owner-operator of sleeping cars. Young has petitioned the courts for the right to buy the company, promising to invest \$500 million in new Pullman equipment—especially in lightweight, streamlined cars—and thus to perform a needed public service. He was able to make this bid because a federal court had found Pullman, Inc., a monopoly in restraint of trade and had ordered divorcement of Pullman's rolling-hotel business from its car-manufacturing business. The court received Young's bid last August, and this precipitated a struggle over Pullman.

Pullman suffers from an extreme form of the arteriosclerosis that affects nearly all railroading. Young calls the disease banker-control. Pullman caught the infection from Morgan. Its cars became old (Young calls them "junk"), yet no one dared give the order to replace them. Its factories were shut down during the thirties, with workers idle on the streets, but Pullman's cautious amortization money lay idle in the bank. Meanwhile, railroads were pleading for new cars good enough to compete with modern autos, buses and airplanes. But lethargy ruled. Edward G. Budd, competitive maker of the new lightweight sleepers, was virtually forced out of this business. Harry S. Sturgis of the (Morgan) First National Bank of New York, and George Whitney, president of J. P. Morgan & Company, talked the New York Central out of buying new lightweight sleepers. "Competitive instincts," as Sturgis called them, were curbed. But the roads didn't get the cars and nearly everyone lost money—except the bankers.

It was this Morgan-Pullman restraint that brought Pullman into court. The Eastern banking group at once showed an intense interest in its future. A memorandum signed by W. F. Place of the New York Central was sent out to all Pullman-using railroads warning them, in effect, that the maverick Bob Young was on the loose again. The anti-Young railroads promptly got together and made an offer to take control of Pullman themselves, with the dominant interest in the hands of the Pennsylvania and New York Central. And the court, setting aside Young's own bid, fell in with this idea.

Thus, after having ordered Pullman's dissolution, the court reversed itself and awarded the sleeper business to the very bankers whom it had already enjoined. The Anti-Trust Division appealed to the Supreme Court. So did Young. The railroad bankers took their case to the friendly Interstate Commerce Commission. The anti-trust people intervened before the ICC. At present both the ICC, acting as a kind of rump court, and the Supreme Court are on the verge of deciding the disposal of Pullman.

Clearing for action

Young has pulled all his roads out of the AAR and is going around denouncing it for spending money which should have gone into railroad service in fighting the Anti-Trust Division. The Wall Street group, for its part, calls Young "unsound" and not the right kind of man to be entrusted with great rail properties. (This view persists, even though he has reduced debt and improved service on all his railroads: he showed an average pre-war operating profit of 38 cents on his C&O, as compared with 11 cents for the New York Central and 19 cents for the Pennsylvania; and last year his road declared extra dividends while these two skipped their regular dividends.)

Now the two sides have cleared for action. Young is in process of forming a new, rival railroad association which will include railroad labor as well as stockholders. He has also stated that, if required to do so by the court, he is ready to divest himself of all his railroad interests upon acquiring Pullman. But, on the other hand, he has made a dramatic move toward increasing his railroad interests. He has just gone in and made his opening bid for mastery over the New York Central—the second largest rail system in the US—in order to give his network an outlet to New York and Boston. His Alleghany Corporation has bought 162,000 shares of the Central's common stock, thus giving him about 2.5 percent of its outstanding shares—a greater holding than that of any director of the road. "The giant New York Central system has been invaded," exclaimed the *Wall Street Journal* on January 9; "it may face its greatest battles since the riotous days of Commodore Vanderbilt in the last century."

Empire without monopoly

What the bankers seem to dislike most about Young is his way of appealing directly to the people and telling them in advertisements all

across the country that they have a right to better railroad service. He's telling them that he will give them that service. He is talking about new-style mass-production Pullmans—about “shoppers’ Pullmans” that will bring housewives into town and give them a base for a day’s shopping—and about putting travelers’ autos aboard specially designed coaches. It all looks like good salesmanship, but there is something more to it than that. Young clearly wants to build himself an empire—but it is to be one free from the tight grip of monopoly. It is to be a reform empire, if he has his way. He is talking straight competition and nothing else, but in the world on wheels that means a revolution.

100. FEDERAL LABOR POLICY

What is the best way to handle industrial disputes? Would the adoption of compulsory arbitration have disastrous effects upon democratic government? The following reading ¹ may help students think seriously about such questions.

Harold W. Metz is primarily responsible for the selection below. In September 1945 the Brookings Institution published his book, *The Labor Policy of the Federal Government*. Meyer Jacobstein, who collaborated in the preparation of this reading, was formerly Professor of Economics at the University of North Dakota (1909–1913) and the University of Rochester (1913–1918). He has had experience as mediator in the clothing industry, as a labor manager, as a Member of Congress, as a bank president, as newspaper publisher, and as Director of the Senate Special Committee on Post-war Economic Policy and Planning (1944).

A NATIONAL LABOR POLICY

by Metz and Jacobstein

Chapter XIII

HOW CAN INDUSTRIAL DISPUTES BE SETTLED?

The fundamental national goal of steadily rising standards of living for the masses can be realized in full measure, only provided disruptions of production resulting from industrial warfare can be localized and minimized. In a complex, highly integrated, economic system, the rate of advancement will inevitably be retarded, so long as stoppages of work occur in key industries. Strikes in any important industry commonly mean serious interference with production in many related industries. In the case of a vital public service, the entire productive process may be disrupted.

Employers, workers, and the general public all have a stake in restricting industrial warfare and minimizing the disruption of production. The interests of the three groups are, in the long run, mutual. That is to

¹ From *A National Labor Policy* by Harold W. Metz and Meyer Jacobstein; copyright 1947 by the Brookings Institution; courtesy of the Brookings Institution.

say, without steadily expanding production, the public cannot obtain a greater volume of goods and services, nor can profits and wages be progressively increased. All groups benefit by the elimination or reduction of industrial warfare.

It remains true nevertheless that at any given moment the interests of the several groups do not coincide. The workers desire immediate advances in money wages, or shorter hours, or improved working conditions, with little regard for the interests of the employer and the public; the employer naturally desires to maintain or improve his profit position; while the public wishes to reap the benefit of lower prices. However, the public is ordinarily not a participant in the wage contract and has no voice in the decision reached.

Because the wage contract is made for a relatively short period, union officials naturally have a short-run view. Their prestige depends upon their success in obtaining with each new contract maximum wage increases. Consequently, year after year emphasis is placed upon the rapid increase in money wages, without much reference to the state of technological progress. In this struggle the strike is naturally looked upon as the primary weapon in the arsenal of labor. Similarly, employers have long regarded the lockout as a legitimate weapon.

The ultimate question with which we are faced in this analysis is, How can industrial disputes be adjusted so as to minimize the stoppages of production? There are just two methods by which industrial disputes may be adjusted: one is by negotiation and agreement between the contending parties; the other is by the imposition of terms by the government. The first method takes the form of collective bargaining; the second of compulsory arbitration either by means of special boards or by regularly constituted industrial courts. The problems involved in these alternatives will be briefly analyzed.

COMPULSORY SETTLEMENTS

Compulsory arbitration involves the determination by a government agency of all the terms of employment that are in dispute between an employer and his employees. The arbitral agency embodies its decision in an award that is absolutely binding on all the parties to the dispute. Employees cannot strike if they are dissatisfied, nor can employers resort to a lockout if they are not pleased with the award. The process of compulsory arbitration is beset with at least four difficulties:

- (1) There are no generally accepted standards for settling industrial disputes. Only where such standards exist, can disputes be settled fairly and the participants be convinced of the fairness of the decision. If comparable cases are to be decided in a comparable manner, principles of decision must be established in advance. The principles now used by arbitrators to settle wage disputes clearly indicate the absence of any generally accepted applicable standards. Numerous principles for adjusting wages have, however, been employed.

Splitting the difference is one of the most common methods of settling such controversies. The arbitrator grants a wage increase approximately half way between what the employees demand and what the employer is willing to give. Obviously a decision made in this way takes no account of the specific merits of the case. This principle merely encourages both parties to take absurd bargaining positions.

The rate of pay prevailing for comparable work is commonly used by arbitrators as a basis for fixing wages. This standard can be used only when there is a free market in which going rates of pay have been established by voluntary bargaining. If arbitration becomes compulsory and general, there is no going wage rate in a free market that can be used as a standard.

Arbitrators frequently adjust wages on the basis of changes in the cost of living. Such a basis of decision takes no account of the employer's capacity to pay the wage. It assumes as desirable the standard of living existing in the base period used. A rigid application of this principle would preclude the workers from ever receiving as wages any of the gains resulting from technological progress.

In the industrial controversies of 1946, certain new conceptions appear. The first is that the true test of an appropriate wage is not the prevailing rate in the industry but what the individual company can afford to pay in the light of its profit situation. This was illustrated in the General Motors automobile case. A second principle was that entire industries should make uniform increases in pay irrespective of variations in conditions. In practice, this implied that the wage increase should be based on the ability to pay of the more prosperous concerns. Third, it was assumed that all of the technological gains of industry should accrue to labor—with employers and the consuming public obtaining none of the benefits.

If governmental decisions on such issues are to be other than arbitrary, it is obviously necessary that the board, the fact-finding committee, the President, or the court should be in a position to determine with some degree of accuracy the profit potential of the industry and the company over the period covered by the wage agreement. Any decision concerning ability to pay involves analysis and appraisal of complex fact situations with respect to costs, prices, and future demands. This task is impossible for either a specially appointed fact-finding board or a permanent board or court. It is difficult enough for the industrial managers whose entire time is devoted to this task. Even they find it necessary to revise their judgments in the light of constantly changing conditions with respect to market demands, competition, and changes in cost.

Decisions based upon capacity to pay—whether of the company or the industry—inevitably involve judgment as to what profits are proper. This is because in any given situation the decision as to what a company can afford to pay necessarily includes consideration of how much profit is essential for continued operation and expansion.

In discussing the problem of standards used in arbitration, it is

necessary to distinguish between the arbitration of disputes involving rights and those involving interests. One of the best examples of arbitration of disputes concerning rights is the settlement of controversies regarding the interpretation and application of the terms of existing contracts. Here the provisions of the contract constitute a pre-existing standard to guide the arbitrator in reaching a decision. But in settling a dispute concerning interests, such as the terms of a future contract, there is no pre-existing standard applicable. The task performed by arbitrators in settling disputes regarding interests differs greatly from the task performed by an ordinary court of law. Courts of law apply pre-existing rules of law to specific fact situations. In this process there is very little room left for arbitrary discretion upon the part of the judge. But in arbitrating disputes concerning interests, the arbitrator is left with wide discretion. Because of the absence of pre-existing standards, it is practically impossible to treat comparable cases in a comparable way as is done in a court of law.

(2) Arbitration decisions would commonly be colored by considerations of political expediency. The absence of specific, concrete standards to guide arbitrators in deciding cases means that they could settle them in an arbitrary way. In an industry-wide dispute involving large numbers of workers, political considerations would often be important. Decisions that would be displeasing to large masses of workers would be deemed politically undesirable. The arbitrator would be interested in a peaceful settlement of a dispute, but he would also be interested in a settlement that would be acceptable to the large number of workers involved.

(3) Compulsory arbitration leads ultimately to general government control of industry. The board of arbitration would have to settle any kind of a dispute that arose between employers and employees. If the workers opposed the introduction of a given labor-saving device, the board of arbitration would have to determine whether this change would be desirable. If an employer desired to move his plant from one city to another regardless of the workers' interests, the arbitrator would have to decide whether the change in location would be appropriate. In determining whether a given wage increase would be proper, the board would have to determine whether the employer could afford to pay the increase demanded. The measure of his ability to pay would be conditioned by what the board of arbitration considered to be an appropriate profit. If technological gains were available for distribution, the board would have to decide how much of them should go to workers in the form of higher wages, how much to the owners in the form of higher profits, and how much to the consumers in the form of lower prices.

(4) A prohibition of strikes is not readily enforceable. Any program of compulsory arbitration would require the complete prohibition of strikes. Arbitration awards must be binding on both employers and employees. Since such decisions would be applicable in the future, it would be necessary to prevent the parties from avoiding them by terminating the employment relationship. Employers would have to be prohibited from closing

down to avoid compliance, and workers would have to be prohibited from quitting if they were dissatisfied.

As a practical matter, no one has as yet been able to devise a system of penalties that would effectively prohibit strikes in disputes concerning interests. The Commonwealth of Australia has had a system of compulsory arbitration and a complete prohibition of strikes for over forty years. In Australia the time lost in strikes is as great as in this country when allowance is made for the difference in population. Because of political considerations, the penalties designed to prohibit strikes seldom have been applied against the workers.

In the United States during World War II, many strikes occurred, although the National War Labor Board was acting as a board of arbitration, and strikes were supposedly regarded as highly undesirable if not completely illegal. As the war continued, the time lost in strikes progressively increased. No penalties were applied against unions which struck rather than resort to the National War Labor Board or which refused to accept the decisions of the Board. Strong and determined unions repeatedly secured more favorable terms by the use of the strike than would have been justified under the precedents of the National War Labor Board. It should also be remembered that the penalties against strikes in violation of the War Labor Disputes Act were seldom applied.

COLLECTIVE BARGAINING

The only alternative to government determination of the terms of employment is private agreements reached between the parties at interest, through the processes of collective bargaining. This is the method that has traditionally been employed in the United States and that has been deemed to be in accord with American conceptions and practices. The making of agreements through collective bargaining has certain definite advantages, and it also admittedly has certain shortcomings.

The primary advantage of the collective bargaining process is that the agreements reached generally reflect economic conditions and factors at the company and in the area where the dispute occurs. The theory of collective bargaining is that the negotiations between an employer and his employees take account of such factors as the current financial position of the company and its requirements for expansion programs; the immediate business situation and outlook; the relative position of the workers as compared with others in the industry and in the area; and the degree of efficiency. The general condition of business and the labor market situation are often factors of decisive importance. In periods of good business and labor scarcity, the bargaining position of labor is usually relatively strong; when business is dull or receding and the supply of labor is abundant, the position of the employer is relatively strong.

If the collective bargaining agreements are to be sound, that is, in accordance with economic realities, the bargaining obviously must be be-

tween groups of comparable strength. Under the individual bargaining process the position of the workers was of course very weak, except in boom times when alternative employment was abundant. Under collective bargaining the position of labor has been greatly strengthened, but until recent times it still remained weaker than that of the employer. The labor negotiators were inexperienced, and they had meager financial capacity with which to meet the sacrifices involved in work stoppages. With the evolution of nation-wide unions, however, the position of labor was greatly strengthened in both respects. Indeed, as we have seen, national labor organizations now commonly hold the whip-hand in dealing with individual employers, especially when they are backed by the power of government.

Since labor agreements cannot work satisfactorily unless they are based upon economic realities, they should obviously be made between the employers and the employees of a given company. The company not the industry is the unit of production; and it is in the individual company that wages are paid and profits are made—or losses incurred. Moreover, it is only in the individual company that mutual understanding and co-operation between management and labor can be worked out. It is there that the practical problems confronting both labor and management arise, and hence it is only there that realistic solutions can be obtained.

We are not suggesting that national labor organizations should be broken up nor that nation-wide employers associations should be dissolved. All groups in the body politic have the right to form organizations of whatever scope the members desire. We are merely insisting that the wage contract should be made between each company and its employees—for it is the productive operations of the individual company which creates both wages and profits. . . .

Collective bargaining on the company basis is also indispensable for the protection of the public. When the bargaining process involves all of the companies in an industry, the stoppage of work will profoundly affect the welfare of the general public. When it is confined to a given company, the public may be inconvenienced, but as a rule only a small part of the industry is closed down at one time. Under this method it would be only in exceptional cases, involving chiefly local utilities, that the welfare of the public would be seriously imperiled.

It should be clearly recognized that collective bargaining, in contrast with compulsory arbitration, implies the use of the strike and the lockout as legitimate weapons. It should be recognized that employees have the right to strike to enforce their demands and that employers have a comparable right to close their plants. Obviously, it is not to the advantage of either party to use these methods except as a last resort.

PROTECTION OF THE PUBLIC

Adherence to the collective bargaining principle does not necessarily mean that the number and the scope of work stoppages cannot be reduced and the public thereby protected. Public opinion apparently will support

limitations on the use of the strike in certain circumstances. Strikes that are not a necessary part of the bargaining process, that are designed to injure third parties, and that are used where an adequate peaceful remedy for settling the matter exists should be declared contrary to public policy. As was suggested in Chapter VII, the right to engage in concerted action could legally be restricted in a dispute where an adequate peaceful remedy for settlement exists. Thus strikes for organizational purposes could be penalized because the National Labor Relations Act provides a peaceful remedy. Strikes to enforce a given interpretation of an existing contract ought to be punished, because courts are available for the interpretation and application of agreements. Where the objective of a strike is illegal, as, for example, to secure a closed shop, the work stoppage could be penalized. The use of force and violence in a dispute ought to be made illegal. Sympathetic strikes and jurisdictional strikes could be outlawed without impairing the bargaining power of workers, because there is nothing that the employers involved in such disputes can do to settle them. Likewise, secondary boycotts could be prohibited, for the immediate objective of such activities is the injury of innocent persons not connected with the original dispute.

To penalize these undesirable activities a number of steps could be taken: (1) employers should be permitted to discharge employees who engage in such practices; (2) the bargaining rights of the union concerned should be suspended or abrogated; and (3) the employer should be permitted to recover from the union any damages that he suffered thereby. In short, the use of work stoppages should be permitted only in cases involving direct conflict over the terms of employment.

The public can also be protected by limiting the power of labor organizations to tie up the entire production in an industry at one time. When concerted action is directed against all producers in an industry, a work stoppage can profoundly affect the welfare of the general public. To reduce the possibility of an entire industry being tied up at one time, this study has suggested that two steps be taken. First, as recommended in Chapter VII, unions should be made subject to the antitrust laws. This would restrict their monopoly powers. As a part of this process, the law should specifically declare that it is illegal for labor organizations to carry on concurrent concerted actions against two or more employers in the same industry, at the same time, as part of a general program. This would make unlawful a centrally planned program designed to shut down many producers at the same time. Second, as suggested in Chapter IX, the National Labor Relations Board should be prohibited from designating bargaining units that include employees of more than one employer. If these steps are taken, the possibility of industry-wide stoppages will be reduced.

For collective bargaining to operate effectively in settling disputes, both employers and employees must be required to bargain collectively. At present only employers are required to do so. Labor organizations are

not obligated to bargain. They can strike without even stating their demands. As was recommended in Chapter VIII, it is necessary to impose the obligation to bargain on both the employer and the union.

As a part of a program for settling disputes by collective bargaining, it would be desirable to create improved governmental machinery to assist in the voluntary adjustment of disputes. It would be advantageous to ensure that the parties involved in a controversy were actually attempting to solve it. Although the existing Conciliation Service has performed useful functions, it needs reorganization. Its operation has suffered from two primary defects: first, it is a part of the Department of Labor, which is expressly charged with the primary task of promoting the interests of the workers; a second shortcoming is its underlying philosophy of peace at any price.

The performance of the conciliation function by the national government could be greatly improved by a few changes. The Conciliation Service should be removed from the Department of Labor. Its functions should be performed by an independent agency, headed by a board of three or five members, all of whom should be completely disassociated from employer and employee interests. Congress should clearly state that it is not the function of this agency to promote the interest of either party. The legislature must indicate that peace at any price should not be its policy.

If the parties to a dispute voluntarily agree to submit it to arbitration, the federal government should facilitate the process. Agreements to arbitrate normally are not considered to be enforceable contracts. The United States Arbitration Act of 1925 does not specifically cover arbitration provisions of labor contracts. The exemption of such agreements in this field was included in this act at the insistence of organized labor. As a result, except in the railroad field, collective agreements to arbitrate labor disputes are not regarded as enforceable contracts in the federal courts. It is desirable that agreements to arbitrate labor disputes be enforceable in the federal courts so far as they come within their jurisdiction.

If the suggestions here advanced to limit the use of strikes should be adopted, it is believed that the number and severity of work stoppages would be very greatly curtailed. However, it must be recognized that work stoppages might still occur. Great public inconvenience and injury could result from a strike on an important railroad or against a significant utility company. Even though all of the suggestions here advanced were adopted, it might happen that the public would be deprived of a vital service over a long period. But it is believed such inconvenience is less undesirable in the long run than the consequences of the determination of the terms of employment by the government. Where great public injury is threatened by a stoppage, the law-making branches of the government—including both Congress and the President—would be expected to step in to meet the specific emergency involved. But it would be highly undesirable to adopt any program that would encourage either party to a dispute to seek government intervention to settle it.

101. STOPPING STRIKE AGAINST GOVERNMENT

The power of the courts to enjoin a strike against the federal government is discussed in the following reading from the opinion of the Supreme Court of the United States, delivered by Mr. Chief Justice Vinson, in the case of *United States v. United Mine Workers*, on March 6, 1947. The text is taken from the pamphlet issued before the bound volume of reports was published.

U. S. v. UNITED MINE WORKERS

Executive Order 9728, in pursuance of which the Government seized possession of the mines, authorized the Secretary of the Interior to negotiate with the representatives of the miners, and thereafter to apply to the National Wage Stabilization Board for appropriate changes in terms and conditions of employment for the period of governmental operation. Such negotiations were undertaken and resulted in the Krug-Lewis agreement. That agreement contains many basic departures from the earlier contract entered into between the mine workers and the private operators on April 11, 1945, which, except as amended and supplemented by the Krug-Lewis agreement, was continued in effect for the period of Government possession. Among the terms of the Krug-Lewis agreement were provisions for a new mine safety code. Operating managers were directed to provide the mine employees with the protection and benefits of Workmen's Compensation and Occupational Disease Laws. Provision was made for a Welfare and Retirement Fund and a Medical and Hospital Fund. The agreement granted substantial wage increases and contained terms relating to vacations and vacation pay. Included were provisions calling for changes in equitable grievance procedures.

It should be observed that the Krug-Lewis agreement was one solely between the Government and the union. The private mine operators were not parties to the contract nor were they made parties to any of its subsequent modifications. It should also be observed that the provisions relate to matters which normally constitute the subject matter of collective bargaining between employer and employee. Many of the provisions incorporated into the agreement for the period of Government operation had theretofore been vigorously opposed by the private operators and have not subsequently received their approval.

It is descriptive of the situation to state that the Government, in order to maintain production and to accomplish the purposes of the seizure, has substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining between the union and the operators. The defendants by their conduct have given practical recognition to this fact. The union negotiated a collective agreement with the Government and has made use of the procedures provided by the War Labor Disputes Act to modify its terms and conditions. The

union has apparently regarded the Krug-Lewis agreement as a sufficient contract of employment to satisfy the mine workers' traditional demand of a contract as a condition precedent to their work. The defendant Lewis, in responding to a suggestion of the Secretary of the Interior that certain union demands should be taken to the private operators with the view of making possible the termination of Government possession, stated in a letter dated November 15, 1946: "The Government of the United States seized the mines and entered into a contract. The mine workers do not propose to deal with parties who have no status under the contract." The defendant Lewis in the same letter referred to the operators as "strangers to the Krug-Lewis Agreement" and to the miners as the "400,000 men who now serve the Government of the United States in the bituminous coal mines."

The defendants, however, point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. It is true that the regulations for the operation of the mines issued by the Coal Mines Administrator provide for the retention of the private managers to assist in the realization of the objects of Government seizure and operation. The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control.

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We do not find convincing the contention of the defendants that in seizing and operating the coal mines the Government was not exercising a sovereign function and that, hence, this is not a situation which can be excluded from the terms of the Norris-LaGuardia Act. In the Executive Order which directed the seizure of the mines, the President found and proclaimed that "the coal produced by such mines is required for the war effort and is indispensable for the continued operation of the national economy during the transition from war to peace; that the war effort will be unduly impeded or delayed by . . . interruptions [in production]; and that the exercise . . . of the powers vested in me is necessary to insure the operation of such mines in the interest of the war effort and to preserve the national economic structure in the present emergency. . . ." Under the conditions found by the President to exist, it would be difficult to conceive of a more vital and urgent function of the Government than the seizure and operation of the bituminous coal mines. We hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-LaGuardia Act does not apply.

II.

Although we have held that the Norris-LaGuardia Act did not render injunctive relief beyond the jurisdiction of the District Court, there are alternative grounds which support the power of the District Court to punish violations of its orders as criminal contempt.

Attention must be directed to the situation obtaining on November 18. The Government's complaint sought a declaratory judgment in respect to the right of the defendants to terminate the contract by unilateral action. What amounted to a strike call, effective at midnight on November 20, had been issued by the defendant Lewis as an "official notice." Pending a determination of defendants' right to take this action, the Government requested a temporary restraining order and injunctive relief. The memorandum in support of the restraining order seriously urged the inapplicability of the Norris-LaGuardia Act to the facts of this case, and the power of the District Court to grant the ancillary relief depended in great part upon the resolution of this jurisdictional question. In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction.

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In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief. The defendants, in making their private determination of the law, acted at their peril. Their disobedience is punishable as criminal contempt.

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The trial court properly found the defendants guilty of criminal contempt. Such contempt had continued for 15 days from the issuance of the restraining order until the finding of guilty. Its willfulness had not been qualified by any concurrent attempt on defendants' part to challenge the order by motion to vacate or other appropriate procedures. Immediately following the finding of guilty, defendant Lewis stated openly in court that defendants would adhere to their policy of defiance. This policy, as the evidence showed, was the germ center of an economic paralysis which was rapidly extending itself from the bituminous coal mines into practically every other major industry of the United States. It was an attempt to repudiate and override the instrument of lawful government in the very situation in which governmental action was indispensable.

The trial court also properly found the defendants guilty of civil contempt. Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. *Gompers v. Bucks Stove & Range Co.*,

supra, at 448, 449. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.

It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.

In the light of these principles, we think the record clearly warrants a fine of \$10,000 against defendant Lewis for criminal contempt. A majority of the Court, however, does not think that it warrants the unconditional imposition of a fine of \$3,500,000 against the defendant union. A majority feels that, if the court below had assessed a fine of \$700,000 against the defendant union, this, under the circumstances, would not be excessive as punishment for the criminal contempt theretofore committed; and feels that, in order to coerce the defendant union into a future compliance with the court's order, it would have been effective to make the other \$2,800,000 of the fine conditional on the defendant's failure to purge itself within a reasonable time. Accordingly, the judgment against the defendant union is held to be excessive. It will be modified so as to require the defendant union to pay a fine of \$700,000, and further, to pay an additional fine of \$2,800,000 unless the defendant union, within five days after the issuance of the mandate herein, shows that it has fully complied with the temporary restraining order issued November 18, 1946, and the preliminary injunction issued December 4, 1946. The defendant union can effect full compliance only by withdrawing unconditionally the notice given by it, signed John L. Lewis, President, on November 15, 1946, to J. A. Krug, Secretary of the Interior, terminating the Krug-Lewis agreement as of twelve o'clock midnight, Wednesday, November 20, 1946, and by notifying, at the same time, its members of such withdrawal in substantially the same manner as the members of the defendant union were notified of the notice to the Secretary of the Interior above-mentioned; and by withdrawing and similarly instructing the members of the defendant union of the withdrawal of any other notice to the effect that the Krug-Lewis agreement is not in full force and effect until the final determination of the basic issues arising under the said agreement.



XVII

Social Security, Health,
and Education



102. RELIEF AND SOCIAL SECURITY

Meriam, "The Present Programs"

103. "JUSTICE AND THE FUTURE OF MEDICINE"

Berge; *Public Health Reports*

104. EDUCATION

"Should the Public School System be Subsidized
by Federal Funds?" Kefauver, *pro*; Benson, *con*.

CITIZENS have found it necessary to give serious consideration to the extent to which the government of the United States should guarantee to each individual social security, sound health, and an education at public expense. Because of the great magnitude of the problems involved, the readings in this chapter should be considered only as suggestive or introductory.

SOCIAL SECURITY, HEALTH, AND EDUCATION



102. RELIEF AND SOCIAL SECURITY

How far should the government of the United States go in providing relief and social security for individuals? What would constitute a "universal, comprehensive, and co-ordinated" program in that area of governmental activity? Students interested in such questions will find the following reading¹ helpful.

Lewis Meriam, the author (b. 1883), was a member of the President's Emergency Committee for Employment (1930-1931); has been Visiting Professor of Public Administration at the University of Chicago (1935-1936); and has held responsible positions with many governmental agencies including the Bureau of the Census and the United States Shipping Board. His writings include: *Principles Governing the Retirement of Public Employees*; *Public Personnel Problems*; *Reorganization of the National Government* (with L. F. Schmickbier).

by Lewis Meriam

THE PRESENT PROGRAMS

The present provisions for relief and social security in the United States are not universal, comprehensive, and co-ordinated. If one looks at the structure as a whole, one sees essential parts dating back to Elizabethan England functioning along side other parts designed by the advanced thinkers of the United States of the 1930's. Conflicting theories of government underlie the different parts, ranging from the local autonomy and responsibility of the early days to the powerful, highly centralized national government of the current period. The principal programs may be briefly described as follows:

1. Old-age and survivors insurance, a contributory no-means-test system operated by the national government for some but not all of the salary and wage workers of the country. It excludes several groups of wage workers, notably agricultural laborers and domestic servants working in private homes. It does not include the self-employed, numerically

¹ From *Relief and Social Security* by Lewis Meriam; copyright 1946 by the Brookings Institution; courtesy of the Brookings Institution.

the most important of whom are farmers, independent business men, and persons engaged in the private practice of their professions.

Not all persons covered by and paying specific taxes for the support of O.A.S.I. are actually insured. The law requires that a person must work in a covered occupation for a substantial period before obtaining an insured status. Thousands of persons who have served in covered positions have withdrawn before attaining an insured status and have forfeited the taxes paid on their wages for the support of the system.

For the fully insured, the system gives old-age benefits after age 65, provided the beneficiary withdraws from substantial employment. It also provides a benefit for the wife of an old-age beneficiary when and if she too attains the age of 65 and for unmarried children under 18. If a worker dies after having attained an insured status, whether before or after retirement, an old-age benefit is provided for the widow when she attains the age of 65 and, with limits, for unmarried children under 18 years of age. If a widow under 65 has the care of an unmarried child under 18, she and the children are entitled to benefits until the youngest child attains the age of 18. In the absence of other beneficiaries a wholly dependent parent may benefit and under certain limited conditions a lump-sum death benefit is paid.

The system is not comprehensive, since it provides no benefits for persons who are forced to retire on account of disability before age 65, whether or not they have attained an insured status. It makes no provisions whatsoever for a worker who has not yet attained an insured status and loses his job in a covered position and is unable to obtain another place in a covered occupation. It does nothing for a widow under 65 who does not have the care of an unmarried child of the deceased under 18 years of age whether she is or is not physically or mentally qualified for employment. It is in essence an old-age system for selected classes of wage earners and their wives or widows, with limited provisions for young survivors and wholly dependent parents.

2. The railroad retirement system, a contributory no-means-test insurance system operated by the national government for the employees of the steam railways of the country and their union representatives. No financial contribution is made by the government. This system does not extend to the employees of other common carriers whether or not engaged in interstate commerce; such employees come under O.A.S.I. Employers and employees of the steam railroads have to pay higher pay-roll taxes than the employers and employees under O.A.S.I. The system provides no specific benefits for wives, widows, and children. The benefits for the men who spend their lives in the railroad industry are, however, substantially higher; disability benefits are provided; and there are no forfeitures in the event of death in the active service or withdrawal from the industry. The railroad system leaves to the individual member a far greater degree of power to determine how his equities in the system shall be used in the interests of himself and his dependents. He can leave his money to a

widow under 65 regardless of whether she has children under 18, to a married child under 18, to children over 18, to grandchildren, to nondependent parents, or to brothers or sisters. The railroad system, unlike the O.A.S.I., does not prescribe precisely who can take and to what extent.

3. The old-age assistance program, a noncontributory means-test system operated by the several states with a grant-in-aid from the national government. The national government contributes one half the cost of such benefits as the state may give, not exceeding in the aggregate \$40 per month in any one case, and 5 per cent of these benefit costs for administration or for benefit payments.

Although the national government provides that benefits shall be granted only to the needy, it does not define need or set up standards for determining the degree of need and the amount of the benefit. Thus the states are left with a large measure of discretion as to what their standards shall be, and hence how much they will draw from the national treasury. Some states with a pension philosophy pay benefits in the neighborhood of the maximum which will be shared in by the national government. Others pay very much less, sometimes allegedly because they lack the resources to pay more.

The grant-in-aid system now in use contains no provision for equalization on the basis of relief load and capacity to pay. There are great variations among the states with respect to the percentage of persons 65 years of age who are in receipt of old-age assistance. In the absence of more precise standards with respect to eligibility and amount of aid to be given, it cannot be established that suitable provision is made for all the needy aged in accordance with a reasonable minimum standard. It seems fairly certain that among the states there is an absence of co-ordination both in decisions with respect to eligibility and the amount of benefit paid.

4. The aid to dependent children program, a noncontributory means-test system operated by the several states with a grant-in-aid from the national government. Benefits are available only for dependent children who are to make their homes with relatives of a degree specified by the national act. They are not available for dependent children who have no relative of the specified degree willing and able to care for them or for children whose relatives of the specified degree are not suitable guardians.

The maximum grant in which the national government will share to the extent of 50 per cent is \$18 a month for the first child and \$12 a month for each additional child. No allowance whatsoever is made under this system for the relative who is to have the care of the child. Thus for a family consisting of a widow and three dependent children the maximum allowance in which the national government will share is \$42. When the widow attains the age of 65, if she is in need, the federal government will share in an allowance to her of a maximum of \$40 under the old-age assistance program. An allowance of \$40 for a widow 65 years of age with no dependents as contrasted with an allowance of \$42 for a family con-

sisting of a widow with three dependent children indicates absence of co-ordination.

5. Aid to the needy blind, a noncontributory means-test system operated by the several states with a grant-in-aid from the national government. The maximum benefit in which the national government will share to the extent of 50 per cent is, as in old-age assistance, \$40 a month. Blindness is of course only one of several causes of total and permanent disability that may make an individual in need of public assistance before he has attained the age of 65. Lack of comprehensiveness and co-ordination is evidenced when the national government singles out one cause of disability for special treatment without giving consideration to the disabled group as a whole. Victims of serious accident, tuberculosis, heart disease, paralysis, and mental disorders may be as much in need as the blind. A comprehensive and co-ordinated system would scarcely make distinctions with respect to the cause of disability, although naturally some differences would arise with respect to the kind of services required by the victims.

6. General unemployment compensation, a contributory no-means-test insurance system administered and financed with respect to benefit payments by state taxes, generally exclusively on employers, under the compulsion of a national tax act. The national government levies a tax of 3 per cent of pay roll, excluding that part of pay in any individual case which exceeds \$250 a month, against all covered employers of eight or more. Against 90 per cent of this federal tax, the employer may offset the amount actually or constructively paid to the state for a like purpose. In this pamphlet no attempt will be made to discuss those provisions of the federal act which permit the states to use experience rating and which under certain circumstances enable employers to get a credit for the full 2.7 per cent pay-roll tax where as a matter of fact they have paid less than that. Here the description will be confined to matters which bear on universality, comprehensiveness, and co-ordination.

The national act does not require the inclusion of (1) persons working for an employer who hires less than eight, (2) agricultural workers, (3) domestic servants in private homes, and (4) employees of governments or of private educational, religious, or eleemosynary nonprofit institutions. Thus it is not of universal operation among wage and salary workers, although individual states, if they wish, may go further than they are compelled to do by the national tax act.

Since the system is founded on the philosophy of insurance, no person is insured unless he has had the requisite qualifying earnings during the base period. Thus the insurance does not extend to new entrants to covered employments, casual workers who except in very good years are not employed with the regularity required, or persons returning to covered employment after a long period of unemployment or disability. Youths willing and able to work but unable to find gainful employment—a class which was of such great importance in the depression of the thirties—are not provided for at all in this system.

The philosophy of insurance made it appear necessary to limit the number of weeks a person may be on benefit in any one benefit period. When an insured person is unemployed for a longer period, he must go off benefit and cannot again get compensation until he has had new qualifying earnings.

The system does not provide satisfactorily for the technologically unemployed. The skilled man who has worked for years without drawing unemployment compensation gets no advantage from his excellent previous record. When discharged because of technological change, he draws benefits for the same maximum number of weeks as workers with a far poorer record. When he has exhausted his benefits, he must again earn qualifying wages in the base period, but his age may make it difficult for him to get the opportunity to start over again in a new covered occupation.

Except in a few states, the amount of benefit is not related to the number of dependents being supported by the unemployed worker. It is determined by his wages earned in the base period, subject to maximum and minimum limitations. Thus the single person with no dependents who has earned well and had opportunity to save gets more than the married man with a wife and several children whose lower earnings have all gone for necessities for his family.

The general unemployment system protects the workers against relatively short-term unemployment, against which thrifty workers who earn reasonably well can protect themselves to a substantial degree by individual savings. It does not protect them and their dependents against long-term unemployment, the type against which commonly they cannot protect themselves and their dependents.

7. Railroad unemployment compensation, a no-means-test insurance system operated by the national government and supported by a 3 per cent pay-roll tax levied against the railroads as employers but not applicable to earnings above \$300 a month. This system, designed primarily by representatives of the railway employees, is specially adapted to conditions of employment in the railway industry and is notably weighted in favor of the low-paid workers, especially seasonal employees.

From the standpoint of co-ordination, the most noteworthy feature is that, unlike most general state systems, it contains no provisions for reducing the tax on employers when unemployment is low and reserves are considered adequate. Thus regardless of the condition of the unemployment reserves the railroads year in and year out pay 3 per cent on all wages and salaries up to \$300 a month. Their competitors in bus, truck, water, and air transportation pay only on pay roll up to \$250 a month and in most states are entitled to a reduction of tax rates when reserves appear to be in satisfactory condition. The size of the resulting reserves in the railroad system naturally encourages the employees to advocate benefits far more liberal than are paid by the general system which is applicable to competing forms of transportation.

8. General public assistance, noncontributory means-test systems

supported by local and perhaps state funds without any grants from the federal government. These systems provide for residual groups of persons in need according to state and local laws and administration. Among the most important groups dependent on this program are:

a. The needy disabled who have not yet attained the age of 65 and are not eligible under any of the specific programs. This group includes those whose need arises from sickness or accident who may be only temporarily disabled.

b. Needy widows and divorced women under 65 years of age who have no children under 18 and are actually unemployable or unemployable in the condition of the labor market prevailing at the time.

c. Needy persons under 65 who are physically and mentally able to work and wish to be gainfully occupied but under conditions prevailing at the time cannot make a living. Certain of these groups should be specifically enumerated:

(1). The self-employed who are excluded from unemployment compensation.

(2) Agricultural laborers, domestic servants in private homes, and other classes of wage earners excluded from unemployment compensation.

(3) Salary and wage workers, who customarily work in covered employment but for one reason or another did not have sufficient earnings in the base period to qualify for unemployment compensation.

(4) Persons who have exhausted their benefit rights under unemployment compensation and have not been able to obtain other employment.

(5) Persons who have such heavy responsibilities for dependents that they cannot maintain them from their current earnings or from the benefits provided from unemployment compensation or other special programs.

d. Children who for one reason or another cannot be provided for under aid to dependent children.

Four points with respect to general public assistance demand special emphasis:

1. It is the last line of defense in the event of a severe, prolonged depression, when thousands of wage-workers will have exhausted their unemployment compensation benefits, when thousands of youth anxious to enter the labor market cannot find jobs, and when thousands of the self-employed will be in need. It is of course to be hoped that the country will escape another severe and prolonged depression, but common sense dictates that this last line of defense be intelligently developed and maintained so that it is always in readiness to relieve want.

2. It may be assumed that, in the event of a severe and prolonged depression, work projects will be undertaken to provide employment for those unprotected or no longer protected by unemployment insurance. The experience of W.P.A. indicates that time, planning, and effective organization are necessary to escape the defects and evils which became so obvious under that emergency work relief program. The intelligent course appears to be to have a sound social security system carry the

unemployed employables on assistance grants until such time as they can be reabsorbed in normally operated private or public enterprises or given employment on well-planned, well-organized, and effective special projects.

3. The financial responsibility for the maintenance of a sound line of ultimate defense should not be left to the individual states and local governments without federal financial participation or a guarantee of it in event of an emergency. Local governments in the United States—and to a lesser extent many state governments—are dependent on general property taxes. These taxes tend to break down in periods of financial stress, especially in communities hard hit by unemployment or by a sharp fall in the price of agricultural commodities. Their revenues fall as the relief load increases. The capacity of the states to carry the burden varies widely and within states the capacity of the local communities likewise varies widely.

4. Experience demonstrates that in many states, particularly in the South, a federal grant-in-aid program which requires the states to match federal funds, draws state money to the federal programs to the neglect of purely state and local programs such as general public assistance. During the thirties the federal grant-in-aid assistance programs and sponsors' contributions for W.P.A. in some states so absorbed state and local funds that needy persons who could not benefit from them had to subsist mainly on surplus commodities which were supposed to be only supplementary to basic relief. General public assistance should have a first priority on public funds and not be as at present the most neglected.

This outline of the eight major programs shows the absence of universal, comprehensive, and co-ordinated protection. . . .

When the time came to arrive at broad conclusions, it was clear that they could be drawn only if assumptions were made with respect to the form of government and the economic system under which the system was to operate and the objectives which were to be sought in establishing it. An assumption of a totalitarian state and the use of the social security system as one of the major devices in the distribution of the earnings of the people would result in conclusions different from those drawn under the assumptions actually used. These assumptions require summarization here.

Basic assumptions

1. The American form of government is to be preserved. The features of this government which are of major concern in considering the present problem are:

a. The individual is endowed with certain inalienable rights which are not to be taken from him by the state. They are guaranteed to him by the Constitution. If Congress, the President, or any administrative officer

or agency attempts to deprive him of them the action is illegal. So long as the nation has a government of law and not of men, the courts will protect the individual against any infringement of these rights.

b. The government is responsible to the people, who express their will through free and uncontrolled elections. If popular control is to be exercised intelligently, the people must be supplied with adequate, unbiased, factual information regarding the policies and activities of government. The government must not control or seek to control public opinion by withholding information or by issuing misleading or inadequate statements. If elections are to be really free, the government must refrain from passing class legislation, giving special privileges at public expense to minority groups, which may hold the balance of power in the democratic elective process.

c. Power is constitutionally divided in an effort to prevent any government, any branch of government, or any special group in the body politic from acquiring so much that it may exercise that power in the interests of a particular group and against the interests of the general public or of individuals seeking to use or enjoy their inalienable rights.

2. The American system of free enterprise is to be preserved. Under this system the functions of the government are to render such public services as are essential, to establish and enforce rules of fair competition in fields where competition is practicable, to prevent the development of monopolies, and in naturally monopolistic fields to regulate and control the monopolistic power in the general public interest. The preservation of this system requires that the government itself shall not compete with private enterprise in fields where competition is practicable and that it shall not use its power to tax or its power to pledge the public credit further than is necessary to render the essential public services. To the maximum possible extent, it will leave the people free to use the fruits of their labors as seems best to them in their pursuit of happiness.

3. The social security of the American people rests basically upon the capacity to produce and distribute needed goods and services. Social security systems are defensive devices of secondary importance as compared with constructive measures to increase the productive capacity of the nation.

4. For normal people with a sense of responsibility for themselves, their dependents, and their neighbors, productive labor is essential to the pursuit of happiness. Existence on a social security benefit provided in part at public expense cannot bring to normal people the same satisfaction that comes from active participation in productive labor.

It is upon these basic assumptions that the following conclusions are based.

Conclusions

1. The basic objective of relief and social security is to relieve need. The relief of need at public expense when necessary has been recognized

from colonial days as an essential function of government. It obviously requires some governmental redistribution of the income of the people. A compulsory social security system should, however, go no further than is necessary to achieve this primary purpose.

2. A person should not be defined as being in need and hence entitled to a grant from public funds if he, himself, or a relative normally responsible for him has sufficient resources to support him and those dependent upon him in accordance with a strictly defined standard of health and decency.

3. Unless the state is to pay benefits to persons regardless of need and embark further than is necessary to relieve need on a program of redistributing the income of the people in accordance with a politically determined formula, a means test is an essential part of a social security system. As New Zealand has shown, a modern means test based on resources and responsibilities can be devised, which used in an adequately planned and financed system will not fairly be open to the major objections that applied to the means test as used under the ancient poor laws. Such a test will permit adjustment of action to the requirements of the individual case, and does not require action on the basis of averages or assumed averages, which is so distinctive a feature of O.A.S.I.

4. Every resident of the United States should be covered by the system and both in theory and in fact be protected from real need.

5. The essential question regarding eligibility should be whether the individual or the family has access to sufficient resources for maintenance according to a strictly defined standard of health and decency. What particular hazard caused the need is not the issue upon which eligibility should turn. Assistance should not depend on whether the person in need has or has not an insured status under some public insurance system or whether he has or has not exhausted his benefits under such system.

6. The size of the benefit should as a rule be only that amount required to bring the recipient to the established health and decency standard. In those cases involving children who are being trained for future service or adults who can again attain self-support, it may be desirable to make some additional grants, although in general it appears preferable to supply them with public services specially designed to meet their requirements.

7. Since need is directly related to the number and type of dependents, benefits should likewise be directly related to the number and type of dependents.

8. Use of a means test is recommended in part because of the high cost of a universal, comprehensive system that without reference to need provides benefits for all upon the happening of any of the common contingencies. Estimates based mainly on census data indicate that had a modest universal, comprehensive no-means-test system been in effect in 1940, the annual cost would have been somewhere between 7.6 and 16.8 billion dollars a year; the exact amount would depend primarily on (a) the level of benefits, (b) the conditions of eligibility, and (c) the num-

ber of persons who, having a choice, would elect to retire on benefits. Because of the aging of the population, annual costs would increase from year to year. By the year 2000 the aging of the population alone would increase the range of cost to between 9.4 billions and 20.5 billions a year. The benefit costs for the present O.A.S.I. system without modifications, a system that is neither universal nor comprehensive, would range between 3 and 6 billions a year, according to the actuarial studies of the Social Security Board.

Use of a modern, well-designed means test would of course materially reduce costs. The same basic data, mainly from the census of 1940, were used in estimating roughly what the costs would have been had a universal, comprehensive, and co-ordinated means-test system been in effect at that time. Various assumptions had again to be made with respect to (1) the level of benefits, (2) the conditions of eligibility, and (3) the number of persons who, having some choice, would elect to retire. The resulting figures gave a range between 1.8 and 7.6 billion dollars a year as compared with a range of from 7.6 to 16.8 billions for a no-means-test system.

In making these estimates, figures for actual unemployment in 1940 were not used because of the wide variations from year to year in the number unemployed and in the duration of the unemployment. Instead, several assumptions were made as to the extent and duration of unemployment. The costs of benefits for unemployment obviously will depend not only on how many are unemployed, but how long they are unemployed and on benefit. Figures have to be based on assumptions as to the average annual man-years of benefit payments for unemployment. A large volume of unemployment of very short duration may call for a much smaller aggregate payment than is necessary when the volume of unemployment is substantially less but of longer duration. Fluctuations in employment from year to year will of course materially affect the amount required for benefits under any system.

9. A universal system should be financed by a universal tax. The one preferred is a flat-rate income tax, levied upon all persons with net income without exemptions. The reasons for this preference are: This tax will give to any person who has been taxed on net income and subsequently becomes a beneficiary of the fund such satisfaction or consolation as may come from having contributed to it. It will make the people aware of the cost of benefits and conceivably help to check the common tendency toward a persistent demand for increasing benefits and liberalizing the conditions under which they are granted. With respect to persons with low incomes or abnormally heavy responsibilities for dependents, such a tax can be so administered that the returns will be evidence that the individual or the family is not clearly above the strictly defined minimum of health and decency. The returns can be so used that they will minimize the humiliation that was a possibility under the old type means test.

10. The proceeds of the special social security tax should be earmarked for a social security fund from which all benefits would be paid.

Should the fund prove insufficient in any year, the deficit temporarily should be made up from the general funds and the rate of the earmarked special tax raised if such actions appear necessary to maintain over the years a practical balance between the special tax receipts and benefit payments. Under the old poor laws the means test was frequently blamed for harshness which was really due to inadequate funds or appropriations. This objection improperly directed against the means test can be overcome by the establishment of an adequate special fund, the assets of which are appropriated to pay the benefits promised. The system of financial administration should require that a statement of the condition of the fund shall be included in the annual budget with such recommendations as are deemed necessary for (a) an appropriation to make up an actual or a prospective deficit, (b) an increase in the rate of the special tax, or (c) a decrease in the rate of the special tax warranted by the size of its surplus. A merit of this method of financing is that the position of the fund is reviewed annually by the legislature and is accurately reflected by accounts kept on a cash basis. In this respect it is vastly superior to O.A.S.I., the condition of which is not systematically reviewed by Congress each year and cannot be reflected except by accounts kept on an accrual system. Because of the many variables in an actuarial system, even accrual accounts may prove grossly inaccurate.

11. The present pay-roll taxes levied on employers for support of social security systems should be abolished. They become part of the labor cost in the production of needed goods and services. Employers must attempt to pass them along to consumers, hence these taxes tend to increase prices or to preclude a decrease in price. It is generally recognized that an upward spiral of wages and prices works against present beneficiaries of a social security system and all others dependent on a fixed money income. If the money benefits of a social security system are to supply the necessary food, clothing, and shelter for persons dependent upon them, prices must be kept down. A tax that operates to increase prices and the cost of living is not a suitable tax to use in financing social security, since the value of such a system is impaired if not destroyed by inflation.

Further objection to pay-roll taxes on employers lies in the fact that they have no relationship to the profits of the employers or their capacity to pay. An employer who gains large profits as a result of the introduction of labor-saving devices pays relatively little, whereas a competitor who makes comparatively large use of labor must pay heavily, although his profits may be small or even nonexistent. The pay-roll tax on employers is a particularly inappropriate device for financing benefits made necessary by unemployment. It is in effect a tax on employment. In the event of an economic decline, it may add to an employer's incentives to meet the recession by cutting pay rolls. At such times the employer may find it impossible to pass on his labor costs, including the pay-roll tax, to consumers, and his alternatives are to take losses, to reduce wages, or to curtail employment. The wage relationships are so complicated at best that it seems

highly undesirable to add to the complications by imposing heavy pay-roll taxes on the employer.

This conclusion does not mean that employers would be exempt from taxation to support the social security system. Like all other persons with net income, they would pay the flat-rate tax on that income. If their efforts to maintain employment resulted in a loss, they might of course have no net income and in that year pay no social security tax.

12. The attempts to borrow devices from the field of private voluntary insurance and use them in social security are economically and socially undesirable, unnecessary, and expensive. . . . In arriving at this conclusion, the fact has not been forgotten that other countries have used some of the methods of private voluntary insurance in their social insurance schemes. It will be recalled, however, that a system of old-age insurance that starts with all active workers paying or occasioning the payment of taxes and provides length of service increments in its benefits will not reach full load for some eighty years. A system which starts in that way but pays flat benefits uniform from the outset, with no length of service increments, will reach approximately full load more quickly, perhaps within 35 years, or roughly when the survivors of the first class of beneficiaries reach extreme old age. Thereafter benefit costs may increase because of improved longevity, the increase in covered population, or the extension of the system to classes not previously covered. Foreign experiments which promise future benefits under such an old-age insurance system will not demonstrate the practicability of insurance methods for many years to come even if they escape the disasters of wars that wreck their economies and the vicious upward spiral of wages and prices.

13. The variations between different sections of the United States with respect to social and economic conditions, and especially with respect to costs and levels of living, are too great to permit the satisfactory use of uniform money levels of benefit. A level which would be adequate in rural areas, especially in the warmer areas of the South, would be entirely inadequate in the highly urbanized metropolitan districts in the much colder North. If the uniform benefits should be made adequate for the metropolitan districts of the North, they would be undesirably high for rural areas particularly in the South. In these areas public funds could be more advantageously spent for education, public health, and other activities that would increase productive capacity and help in raising the level of living of working people and their dependents.

14. Redistribution of income in accordance with a governmentally determined formula is an inescapable element in any social security system. The politically chosen legislature determines how far it will go in such a redistribution. It seems politically dangerous to centralize this power in the national government. Instead it should be decentralized in an effort to minimize its use for corrupting the electorate as a whole or especially minority groups which may hold the balance in an election and thus obtain or retain control of the vast power of the central government. There

is reason to question whether the power of the central government has not already reached such proportions that the problem of its control by the people in the general public interest is not the basic domestic issue. The conclusion is therefore reached that a universal, comprehensive, and co-ordinated system should be operated under a grant-in-aid system.

The federal government would establish low minimum standards with which the states would have to comply to be eligible for federal aid. Regardless of the state of residence, federal aid would be such sum as is necessary in each case but not exceeding a specified maximum amount. In the states with least capacity to pay, the federal grant would be sufficient to insure needy persons a living in accordance with a low minimum health and decency standard, provided the state itself made a small contribution which would be within its capacity. Wealthier states would get the same maximum federal grant per case as the poor states. They would, however, be expected to put more of their own money into benefits so that the level would be satisfactory to their citizens. The state legislatures would determine for themselves by how much they would exceed the federally established minimum standards. State officers—state residents—and not federal officers would administer the system with no greater degree of national supervision than would be essential to insure compliance with the federal minimum standards. States which desired to be exceptionally liberal could be, provided they paid for their liberality from their own funds.

15. Under the American federal system, the national government in grant-in-aid legislation has functioned as an establisher and enforcer of minimum standards and as a superior government to which an appeal could be taken from the action of any state. When the national government takes over functions and activities previously exercised by the states, there remains no government of appeal. The members of Congress and the President may review with a large measure of objectivity the action of a state government which has been questioned by other states or even by its own citizens. Neither the President nor any of his appointees has direct responsibility for the action against which complaint is lodged. Whether that state is governed by the party in control of the national administration or by the opposing party, members of Congress appreciate that the law and the rules which are applied to that state will be equally applicable to their own. Since no one party is in control of all the states, or judging from history is likely to be, the issue of party advantage is not so likely to play a major role.

When the national government legislates and administers, complaints and criticisms are often directed against the President or officers appointed by him for whom he is responsible. Members of his party in Congress are under great pressure to support him, and if they are in the majority in either house, they control the committees of that house. Members of the opposition party in Congress naturally seek to gain what political advantage they can from the situation, and if their party is in control

of either of the two houses and its committees, the democratic processes for the time being may not appear effective. This weakness in the American form of government is one of the reasons a grant-in-aid system is recommended.

16. The administration of a universal, comprehensive, and co-ordinated system of social security requires thousands of government employees. They should be selected under the merit system strictly and intelligently enforced, and they should be prohibited from engaging in political activity. The effectiveness of a merit system law depends on the integrity and ability of the persons responsible for its enforcement. Under a grant-in-aid system the national government can be given authority to establish standards of merit system administration with which the states must comply and to supervise them to obtain compliance. The penalty for noncompliance is of course withholding of federal contributions. Here again the fact that not all the states are controlled by the same party is a factor in promoting good administration under this system. In the national government a single political party is always in control of the administrative branch of the government. Its representatives are responsible for the enforcement of the merit system laws, including those prohibiting government employees from participating in political activities. Government employees engaged in the administration of social security laws necessarily must have a large measure of administrative discretion. They are thus in a position to exercise influence over beneficiaries. To minimize the influence that may thus result, a grant-in-aid system with rigid standards for personnel administration is recommended. The danger of a few states doing poor work is far less than the danger that the party in control of the national administration may use the great body of employees for partisan advantage.

17. Under such a federal grant-in-aid system, the state and local administrative agencies should not only give aid in all cases where it is necessary to relieve need, they should wherever possible render constructive service to rehabilitate individuals and families. The welfare agencies should have a particular concern for children to see that in so far as possible they take advantage of the educational and other opportunities afforded by the community. To this end the welfare services should co-operate actively with the agencies in the community concerned with education, health, and employment.

18. A social security system should be based on concepts of welfare. It should not be directly tied into wages, which are not only already highly complicated but apply only to a single, though large, section of the economy. The system should establish a floor below which no one would be allowed to sink without being eligible for prompt and certain public assistance if he desired it. It should leave the individual free to raise himself and those dependent on him as much above that floor as his ability will permit, without being taxed for benefits for persons who may be materially better off than he is.

103. JUSTICE AND THE FUTURE OF MEDICINE

Students concerned with the function of government in the distribution of medical services will find worthy of consideration the following article.¹ The author, Wendell Berge (b. 1903), is a member of the law firm Posner, Berge, Fox & Arent of Washington, D. C. In 1943 he was made head of the Antitrust Division of the Department of Justice of the United States. His writings include *Cartels* and *Challenge to a Free World*.

by Wendell Berge

Let us briefly survey the great trends which converge upon medicine, for they decree a revision of means if the great ends of the Hippocratic oath are to be served.

First, the art of medicine has refused to stand still. The family doctor, with his bedside manner, his nostrums, his ponderous vocabulary to conceal his perplexities, his downright devotion to duty and sacrifice of self, was once the very epitome of the art of healing. He has been succeeded by the general practitioner who is the focus of a group of specialists, of which there are now more than a score, each with what a lawyer would call its own jurisdiction. The doctor's office, filled with gadgets and contraptions, has become a combination of consulting room, laboratory, and miniature hospital. A number of separate shops for X-rays, chemical tests, and pathological checkups have become necessary adjuncts. Access to a hospital has become a requirement of the individual physician. Consultation with his fellows has grown into an essential of practice. And behind all this is medicine which, as science and art, is on the march. Behind medicine stand optics, physics, chemistry, biology, and bacteriology, and still medicine continues to capture provinces which until recently lay beyond its frontiers.

Second, the community which the physician must serve has changed with the times. In the good old days the parson, the squire, and the doctor each held sway over his flock. Allegiance to the family doctor was a tie so firmly rooted that it took a crisis to break it. But our world no longer invites so durable, so personal, so exclusive a relationship. The machine, the corporation, and the pecuniary calculus have made over our work, our lives, our personal relationships. Our society has become urban, industrial, gregarious. We have become a new sort of wanderers, a race of modern nomads operating a material culture.

For most of us a job has come to replace an equity in the old homestead. For most of us livings, no longer taken directly from the farm, are pent in between the wages we receive and the prices we must pay. As individuals we are as stubborn as ever our ancestors were. But we act far

¹ From "Justice and the Future of Medicine" by Wendell Berge, *Public Health Reports*, Vol. 60, No. 1 (January 5, 1945); courtesy of Mr. Berge.

less on our own and far more as managers, agents, or employees. Our industry is operated by corporations, our farmers band themselves into cooperatives, our workers, skilled and unskilled, gather into unions, even the great mass of our scientists make their discoveries while working for others. In our culture the group has come to be the regular thing.

Against such forces our minds cannot stand firm. Profound changes in habit, interest, and value have come in their wake. The standard of living has moved to a place of primacy among our everyday concerns. It makes the costs of medical service an inescapable problem. The care of the sick no longer can be absorbed by the family; it becomes an item of expense in the budget. If it is a wage earner who is ill, there is a double cost; absence from work means loss of earnings and bills are there to be paid. So medical service becomes a sheer economic necessity, for unless a man's capacity to work is maintained, he ceases to earn. Health thus becomes an aspect of the operation of the national economy.

Within this urban, industrial, wage-earning society, men and women are becoming increasingly conscious of what they want. Our workers demand health as a condition of their livelihoods. They insist upon adequate medical service at a price they can afford to pay, and in their newly-won self-respect they will refuse all charity.

Third, a changing medicine has not yet been adapted to its new world. The high objectives of the profession endure, for they are eternal. But they must be freshly applied. Our society cannot be served by an instrument designed to fit the family physician into the village community. Neither my time nor your patience will permit a prolonged analysis. Yet two or three soundings will reveal the nature and contours of a very insistent problem.

In the not so long ago the old-fashioned doctor could be depended upon to administer medicine for the community. He could see to it that needs were met, service was adequate, and costs were justly distributed. The physician of today is in no position to discharge this office. His practice comprehends, not the whole community, but a mere fraction of it. If he is a specialist, the fraction is highly selective. And the whole body of physicians, each operating by himself, has no collective instrument by which it can apportion the totality of service in accordance with general need. Nor can it any longer take the specific responsibility of graduated charges. The sliding scale survives as a legacy from a simpler society and it has not yet been shaped to the circumstances of modern life. In the larger cities and even in smaller places, there is something of a trend toward fashionable, middle-class, or industrial-worker practice. Here obviously the sliding scale no longer operates, for different physicians serve persons in different income groups.

It is far more serious that charges as a whole are quite out of accord with the ordinary standard of living. As medicine has advanced, its arts have become more intricate. Yet very little attention has been given toward making up-to-date facilities available at prices the common people can

afford to pay. It is not that on the whole physicians are paid too much; the statistics I have seen lead me to believe that their remuneration is quite inadequate. It is rather that there is waste, a failure fully to use facilities, a lack in getting the most out of a trained personnel.

The result is a national tragedy. The rich, who do not have to consider price, are often pampered with medical care which they may not need. Paupers are often indulged with a service which rises far above their ordinary way of life. The great middle class finds charges on the whole quite above its ability to pay. As a result, a great part of our population tries to reduce its demand for medical service to the minimum. A great volume of cases reach the doctors in an aggravated condition which, in an early stage, could have been easily handled. Necessary service is often secured at the cost of a heavy debt—a fact which does not make for health. And a far larger part of the people than I like to admit never become your patients.

Here then is challenge. The arts of medicine have advanced; the importance of medicine has been enhanced; it has become a necessity to the people and an essential in the operation of the industrial system. It has outgrown the organization into which, in days of petty trade, it was cast. The demand is for a vaster, more comprehensive, more reliable medical service. If an instrument of the common health can be provided on terms the people can afford, the people will rejoice. If you do not help them to it, the people will seize upon whatever agencies are at hand as a help in time of need, for the universal demand that the common health be served cannot much longer be stayed.

A new medical order is inevitable. Whether we shall cling to the old order or create a new one is not the question. The swift course of events has decreed that there can be no turning back. The question is rather what sort of a medical order it is going to be and whether it is the best which wisdom and knowledge can contrive. Like every promising venture, it has its hazards. Is it to be shaped by the best understanding which law, medicine, and the social studies can bring to it? Or is it to be constructed by amateurs in ignorance but with good intentions?

I can understand how, in the face of a new venture, you wonder whether change may not fail to constitute progress. I am certain that there will be serious loss if you sit upon the side lines and allow whoever may come to power to shape this new medical order.

As medicine gropes for a new organization, we all hear much of the doubts and fears of the profession. Many doctors are fearful lest objectives which have been hard won and which they value highly be lost. Many do not see how things which to them are essential can be fitted into a new order. Let us consider a few of the current perplexities.

A great many physicians are justly fearful that the quality of service may be compromised. From the profession I have frequently heard the argument that, when the Government undertakes to look after the health of the people, the service rendered is invariably poor. With this insistence

on quality I fully concur. Nor do I dispute the fact that the new venture may provide a service that fails to meet the standards of the profession. But I cannot follow the argument that a causal relation exists between Government auspices and poor medicine. The truth is that the new system will bring medical care to hosts of people who before have had no access to it. For them there can be no falling off in quality: there has been no service to fall off in quality. Under a new system the provision of doctors and facilities almost always falls short of the new and enlarged demand. As a result, doctors with exacting notions discover much with which they can find fault.

But let us be fair and place the blame where it belongs. The shortcomings are not necessarily due to the new system. They are probably due to the shortage of personnel and equipment with which to work. It is hardly wise to blame untried arrangements, when there is a scarcity of doctors, nurses, clinical facilities, and drugs. No system can discharge its obligations if it lacks the men and materials with which to carry on.

Much is said, too, about the maintenance of a "personal relation" between doctor and patient. Like the law, medicine is practiced by persons and is practiced upon persons. The patient may be served by one or a number of physicians; the contact may endure for a single call, over a stretch of time, or for a long period of years. But in the practice of the profession, there is no escape from a personal relationship. The law has made this clear beyond a reasonable doubt. Not so long ago a declaratory judgment was sought in the District of Columbia against Group Health Association. The action was brought in behalf of the Medical Society, which argued that a corporation could not legally engage in the practice of medicine. The court replied that medicine can only be practiced by physicians and that Group Health, a corporation, did no more than furnish the auspices under which doctor and patient were brought together. Whatever the character of the organization, the relation is in essence personal.

An oft-repeated variant of the same theme is the insistence upon the right of the patient freely to choose his physician. As a patient I am quite willing to have this right qualified for my own good. A well-recognized principle of economics has it that freedom of choice should be limited where the consumer is not a proper judge of the quality of the ware. If there is one field where freedom of choice should be qualified, it is medicine. For medicine is not one thing but many things. Its services are of a highly technical character. If we are downright honest, you and I know that the layman possesses neither the facts about the distinctive competence of particular physicians nor trustworthy norms to guide his judgment. In a matter of medicine, I am not foolish enough to trust my own choice, and a check with some of my lawyer colleagues indicates that they agree with me. I have over the years, through the devious ways by which a layman gets a little practical knowledge, discovered a physician or two whose judgment I have reason to trust. And with me it is their choice, not mine, which goes.

How many patients have walked into your office whose ailments have been aggravated by an amateur's choice of a physician? If for a moment I can be quite rash, I venture to say that in medicine competence does not wholly accord with ability to attract patients, as in law it does not always rest on ability to attract clients. List, if you will, the six physicians in your city in which you repose the greatest confidence. Let me, from the records of the Bureau of Internal Revenue, list the six who have the highest incomes. It's dollars to doughnuts, isn't it, that the lists do not match? People go to Johns Hopkins or the Mayo Clinic not to be treated by a particular doctor, but to secure skillful service. A personal choice, for that matter, can be secured even under State medicine. But far more important to the patient is the assurance of a high standard of competence.

Nor is wide-open freedom fair to the physician. He should on sheer merit advance in his profession. In all justice his work should be judged, not by the laity, to whom medicine is still a mystery, but by men of his craft who can distinguish brilliant from routine work. "The free choice of a physician," I fear, has become a shibboleth which will not stand analysis.

Candor compels me to say that I feel much the same about the argument that group practice robs the physician of his incentive. In its usual form it runs that if a man is on his own, he will give his best; if he works for a salary, he will put in his hours and let it go at that. The age-old traditions of your honorable profession deny the truth of such an argument. Your code of medical ethics has always elevated the relief of suffering above the pursuit of gain. Its purpose has always been to save the physician from avarice, one of the seven deadly sins. It has long been a canon of yours that service is to be given to rich and poor alike, that quality is not to be tempered to the ability of the patient to pay. My limited experience indicates—and a number of colleagues to whom I have put the question concur—that the mightiest urge to which the physician responds is the pride, the drive, the keeping faith with his calling. A doctor cares, and cares mightily, about the respect of his fellows. A friend of mine tells me of his oculist who insisted he should stop in Baltimore and consult an oculist there. My friend, professing himself satisfied, saw no occasion for the consultation. Finally the oculist said, "Do I have to be brutally frank? I'm damn proud of that operation on your left eye; Dr. Blank is my old teacher, and I want an excuse for him to take a peek at my work." You know better than I that a conscientious and resourceful physician is not, if he can help it, going to allow a case to lick him, and if the case is tough and he loses, it hurts.

Now I do not say that material things are to the doctor of no account. Like the judge, the lawyer, the engineer, the university professor, he has a right to demand advancement, security, and income adequate to his standard of life. For the professional man such things are necessities. Without them the physician is not in a position to give his best.

But such values depend upon no one single way of organizing medi-

cine. To say that a doctor will give his utmost if he acts as his own business agent, and that his incentive will be stifled if he receives a salary, is not borne out by experience. The time was when the great scientific advance was the work of the solo inventor. Today the most creative of all work, the progress of science and the useful arts, is the product of men on salary. In the larger offices the great mass of lawyers now work on salary and work as hard and as heroically as the youngster who used to flaunt his own shingle in the breeze. It is true that the chance to become a partner is an incentive, but I would not rank it overly high, for work equally as good is done by the lawyers in the Government, where no such opportunity exists. In our institutions of higher learning, research as well as teaching falls to salaried employees and there you will observe an interest, excitement, devotion to duty, an urge to be up and doing. To return to medicine, how many thousands of our best doctors are today giving their all without stint in the service of the Army and the Navy?

Ambition, security, income are necessary things. They have in every age and among the most varied conditions of society driven men to accomplishment. If I were a youngster, I would rather leave the series of judgments which shape my career to men of my own profession than attempt to get ahead by translating my skills into the art of winning and holding patients. Most important of all, why is it that doctors are troubled by this doubt when university professors, lawyers in public service, officials who make of government a lifework, never even raise the question. And why is it that, when the Government of England first undertook to offer medical service, there was quite a chorus which viewed with alarm the loss of incentive, while today such a doubt remains unvoiced? It is easy enough to answer the argument that a salary will kill the urge to serve; it is hard to understand why the question is ever asked.

It is too late to turn away from that fearful subject of the State as employer, for I am already discussing it. As for myself I have no more fear of a venture of the State into medicine than I have of a venture of the State into law. The venture into law is old—judges, public counsel, prosecuting attorneys, are examples. The venture into medicine, the pauper and the criminal aside, is new, but the traditions and high standards which have long operated in one realm can be established in the other. Our Federal Government, in most of its activities, has adhered to a very high standard of professional competence. If for a moment I may be personal, I have experienced the practice of law in a large private New York office and in the Department of Justice. The Government has never imposed upon me restrictions which I have felt to be a burden. If anything, I have enjoyed a greater freedom than I could have had in a private law office. It is true that frequently my own judgment is tempered by the opinions of my colleagues. But usually a consultation, as you call it, leads to a sounder decision than any one of us alone would make.

You are right in insisting that high standards of medical care must not be compromised. But standards are a professional matter. Their chief

dependence is upon adequacy of resources. They are not inherent in any type of organization. Your current way, as well as State medicine, has its insidious dangers, and, since comparative merits are at issue, I am not content with any argument which points out vices in the one without looking at the faults of the other. As it is now practiced, medicine is exposed to the corroding ways of business. Witness the recent exposure of fee-splitting in the city of New York. Under another dispensation, medicine may be exposed to the strange ways of politics. Which is the greater temptation, I am not able to say. But politics is a thing from which no activity of man is free. It can be employed to achieve holy as well as unholy results. And the State is not, as some of my physician friends seem to fear, a ward heeler telling the doctor how to practice.

I am not, mind you, presenting a case for or against the prevailing system, State medicine, or any particular medical order. There is, as I said at the beginning, no such question as private practice versus socialized medicine. For practice is never private and all medicine has a social function. The question to be faced is harder, more intricate, far more detailed than any such antithesis suggests. First of all you must ask what you want medicine to do. That is easy, to furnish to the whole population an adequate service of quality upon terms it can afford. Next, you must contrive ways and means of seeing to it that the great variety of services we call medicine are called into play to serve the common health. Next, you must set up protections against the hazards you and I see so clearly. And finally, all of these arrangements must be brought together into a going organization. Such a result is not to be attained by an act of faith or a single trial. The conditions of health vary from city to country, from section to section. The needs of the people as locally felt must be met, and this means variety, flexibility, and capacity for adaptation. It means, seek—honestly, objectively, courageously—and ye shall find; knock at many doors until the right ones shall be opened to you.

There is no royal road to a modern medical order. Thus the system we seek is not a choice between private practice and socialized medicine. In following his private calling the physician is fulfilling a social service; in medicine "private" and "social" always have been and always will be associated. These terms, so frequently set down as opposites, have only the most evasive content. Private practice has no stabilized form; the private practice of the country doctor who rode his horse, made his rounds, and was monarch of all he surveyed is not the private practice of a modern urologist. And "socialized medicine" embraces systems as distinct as the charity of the medieval church, the Royal College of Physicians, the clinic of a modern university, the bureau of public health, and the Russian way. You can no more get anywhere with such terms than you can practice your profession with a general concept of disease as your stock in trade.

The question demands, not an easy answer, but painful, constructive, detailed thought. It demands, too, an indulgence in downright trial and error without which nothing worthwhile emerges. A few experiments—far

fewer than the length and breadth and depth of the subject demands—have been blazing fresh trails. Increasing numbers of physicians have enjoyed practice on their own and on salary, and are prepared, from experience rather than in speculative terms, to assess debits and credits. In my pocket I have a letter from one such physician who sets down an illuminating comparison by no means to the disadvantage of salaried work.

Last but most important of all, the war has accelerated a trend long in the making. A host of physicians now in service are conscious of the shortcomings of "military medicine" and have scores of suggestions as to how it can be improved. But they have become aware of the tremendous possibilities which inhere in a medicine directly organized to perform its function. Millions of soldiers, returned from the front, are going to demand for themselves and for their families the instruments of health to which they are entitled.

The course of events moves fast and a new medical order seems inevitable. My fear is not that we will not get it; an awakened public, sparked by our veterans, will see to that. My fear is that we will not bring to its creation all the knowledge, wisdom, and understanding we possess. A reference to the Wagner-Murray-Dingell bill will make my point. About its intent and objectives for me there can be no dispute. The detail of its provisions, however, may or may not fall short of its purpose—I do not know. On ways and means I am open to argument in behalf of something which is better. Of the necessity for distributing the cost of protection against illness I am wholly convinced, and I think the American people are adamant.

The medical order our stalwarts defend has already ceased to exist. A new medical order will come into being even though we do not will it, even, in fact, if we stubbornly resist it. For the medical order, like other institutions, cannot insulate itself against the impinging culture. It must make its response to the great pulsing tides which everywhere else enter our national life. The wiser physicians know that sheer opposition is not going to hold back the tide. They are putting forward—it seems to me a little timidly—proposals of their own. The other day the medical society right here in St. Louis voted approval of a plan for prepaid medical care, and the papers stated that a minority of doctors thought it did not go far enough. Timidity must be replaced by high resolve, and I am afraid that a very old adage which goes back at least as far as ancient Egypt applies here: "If you can't stop a movement, join it."

Seriously, support of the doctors is essential to the salvation of the movement. The organization of medicine is an affair of a couple of shops. It is a job for the craftsman in social order, but it must be shaped to the very life of the medical service it has to offer. If doctors oppose, or stand on the side lines, the layman will create a medical order which may prove to be indifferent or even blind to the values doctors prize most. If the doctors assume a role in its creation, they can see to it that no compromise is made with the standards of the profession.

The problem thus becomes one of creation. In respect to the selection of personnel, the standards of care, the carrying of risks, the methods of payment, the ways of remuneration a score of ways are open. The form of organization may follow an agency of the State, the university pattern, the hospital set-up, or a combination of devices from all these. The Government may dominate the system, become one of a number of parties to its management, or be excluded from it altogether. The venture may fall into the legal form of a public health authority, a nonprofit-making corporation, a series of independent or interlocking corporations, a group of consumers cooperatives, a mutual association of the profession and the laity, or something else. Its direction may be lodged with a tripartite board, representing the Government, the public, and the profession, or the public and the profession, free from Government interference, may assume joint responsibility. It may or may not be State medicine; it cannot escape being social medicine.

It is man for whom medicine exists. Its function must be to keep a whole people in health. The doctor must be the focus, but upon his office a host of unlike services must converge. The physician must not stop with asking, "Of what is this man ill and what can I do about it?" He must also inquire, "Why and how did this man become ill in the way he did?" The quest leads beyond cure to all the conditions upon which personal well-being depends. Food, clothing, housing, recreation, family, occupation, social life are all terms in the equation of health. Nor must man's habitat be forgotten, for adaptation is a requisite of the life process. Many arts must converge into the new medicine; prevention, sanitation, the public health must become a part of it. At its hub must stand the doctor; it is he who must direct this vast apparatus of skills, specialized personnel, facilities to the service of the human being. The medical order I suggest, and which the American people are going to have, will be vaster and mightier than anything we now know.

Such a medical order, it seems to me, should be hailed enthusiastically by the physician. In respect to professional matters his word will prevail. His opportunities for service will be greatly enlarged. He will have access to facilities which only the exceptional physician can now afford. A shift in work now and then will keep him alive in his profession. He can get away occasionally for further training. And above all, he ought to be better able to turn his clinical work to permanent account.

In an abstract way I recognize the value of ivory-tower research. But, after all, the heat of the daily round has its own contribution to make. In our Antitrust Division we have in the last 5 years perhaps done more to blaze a path for the law than any law college faculty in the land. The result has not been due to any unusual ability of ours. We have simply been on the firing line and have had an opportunity to turn our clinical work to account. To me it seems that one of the great shortcomings of the prevailing medical system is that the practitioner is kept so busy with his patients that he cannot translate his work into medical discovery.

Thus, in the end, I return to my beginning. I can hand you no ready-made medical order on a silver platter. If I could, it would do you no good. I can only suggest to you, whose minds have long been busied with the subject, some reflections of a man of another profession. And I am positive that a service adequate to the times cannot be brought into being without the doctors' creative participation. As doctors and patients we face a crisis, and my appeal is to the ancient wisdom of the profession. The ends of medicine remain unchanged; ways and means must be found to adapt its practice to the conditions of present-day society. A new organization must be created that an ancient mission be not lost, that once again medicine shall be available to all in need and charges shall be graduated in accordance with ability to pay.

An instrument of the common health such as never before has been offered to a people is within our reach. This is no time for petty doubts and timid moves. In the face of a national challenge we must, as one of our great jurists said of the law, let our minds be bold.

104. EDUCATION

Should the federal government furnish funds to equalize educational advantages for individual citizens in the different states or should the support of public education be left to the states? The following PRO and CON excerpts¹ reflect different views. Estes Kefauver (b. 1903), lawyer, has been a Member of Congress from the Third District of Tennessee since 1939. Before Dr. George S. Benson became President of Harding College in 1936, he had served as principal of a high school (1924-1925) and as missionary, teacher, and President of a Bible school in China (1925-1930).

SHOULD THE PUBLIC SCHOOL SYSTEM BE SUBSIDIZED BY FEDERAL FUNDS?

PRO

by U. S. Representative Estes Kefauver

In the November, 1945, issue of *The Tennessee Teacher*, Representative Kefauver, Tennessee, Democrat, pointed out "unequal" educational burdens on the States.

"To people who do not believe education is essential to the creation and maintenance of a high economic and social status for the people of America there is no need to discuss Federal aid or even State aid for education. To those who do not believe that the opportunity to attend a good school throughout childhood and youth is a right that should be enjoyed by all there is not much point to the discussion of devising methods of school finance to place a floor under a desirable minimum of edu-

¹ From the *Congressional Digest*, An Independent Monthly Featuring Controversies in Congress, Pro and Con, February, 1946; courtesy of the *Digest*.

cational opportunity for all American children and youth. To such persons it seems all right that educational opportunity should be left to the chance of being a member of a family or the resident of a community that possesses the financial means to pay for education. To them it seems all right that the children of the masses of the people regardless of talent, ability, and character should become the hewers of wood and drawers of water for privileged persons.

"Fortunately a very large majority of American people accept equality of opportunity; especially equality of educational opportunity, as the birthright of every American child and agree that a legitimate function of democratic government is to sustain and make a reality of that birthright. The American people, by and large, believe that the kind, quality, and amount of education received by our people is a primary factor in their economic, political, and social welfare.

"Granting that education is essential to our national well-being, is Federal assistance in financing schools a necessity? This question has too often been answered by merely citing the tradition that the support of public schools is a State responsibility. It is a fact that under the Tenth Amendment of the Constitution of the United States the control of education is a power reserved to the States or to the people. But from the earliest days of the Republic the Congress has been upheld by the courts in exercising the right to grant financial assistance to the States to promote the general welfare. In so doing the Congress does not gain the right or power to take from the States the control of the activity or agency aided.

"Merely citing the doctrine of States' rights and responsibilities does not remove the economic necessity for Federal participation in the support of public education. The economic necessity for Federal aid has been so thoroughly established and should now be so well known as to require no further discussion. In a nutshell it is this:

"There are great inequalities in the economic ability of the States to pay for education. These inequalities have been relatively constant for many decades. Furthermore, the States with the least economic ability to raise public revenues have many more children in proportion to adult population than the richer States. A few pertinent facts will illustrate the point.

"In 1943 the per capita income in California was \$1,429; in Tennessee, \$649; in West Virginia, \$688. The number of children 5 to 17 years old per 1,000 population in 1943 in California was 172; in Tennessee, 249; in West Virginia, 281 (the highest in the Nation).

"These facts mean that in order to raise the same amount of money per child of school age in 1943, West Virginia would have had to make about three and one-half times as much effort, and Tennessee about three times as much effort as would California. In order to raise \$105 per school-age child in 1942-43 (which was the average amount actually spent per pupil in average daily attendance in the Nation as a whole that year)

West Virginia and Tennessee would have had to make two and eight-tenths and two and six-tenths times the actual national effort, while California could have raised the same amount per child with only eight-tenths times the national effort.

"The inequalities of educational opportunity resulting from the unequal educational burdens and the unequal ability to pay for schools have for a long time been well known. The average expenditure per pupil in average daily attendance ranges from \$35 in Mississippi to \$179 in New York (Tennessee, \$55). The average salary of teachers (1942-43) range from \$654 in Mississippi, to \$2,697 in New York (Tennessee, \$963). The average salary of a rural teacher in the United States is only \$959 as compared to \$1,955 per urban teacher. The per cent. of youth of high school age actually in school ranges from 40 per cent. in Mississippi to 95 per cent. in Washington (Tennessee, 45.6 per cent.). These inequalities of opportunity constitute an intolerable situation in a democratic Nation.

"There is now pending in Congress legislation calculated to remedy the situation, the Thomas-Hill-Ramspeck Bill (S. 181 and H. R. 2849). Hearings have been held and the Senate and House Committees should lose little time in reporting them to the Senate and House for a vote. Without doubt a majority of both Houses is favorable to such legislation.

"The bugaboo of Federal control of schools should not be permitted longer to deny adequate educational opportunity to several million of our Nation's children. We can have Federal aid without Federal control. To deny that we can is to deny the successful operation of our form of government.

"I believe that if the Federal Government has the right to reach into the most remote corners of the Nation and call youth to the defense of the Country that same Government has the obligation to support a programme of education that will enable them to perform such a duty well.

"The heaviest burden for paying for this war will be laid upon those who are now the Nation's youth. I believe it will strengthen the faith of youth in their Country's future if the National Government will guarantee the financial support of a program of education which will enable them to pay this debt.

"I for one believe that the school teachers of America are the first and chiefest servants of the Nation, and that the laborer is worthy of his hire. Federal aid is necessary to adequate remuneration of our teachers."

CON

by Dr. George S. Benson

Arkansas, a relatively "poor" State, can and should get along by herself. So Dr. Benson, chairman, executive committee, Arkansas Public Expenditure Council and president of Harding College, maintained before the House Committee on Education. [May 3, 1945.]

"The taxpayers' association in a State which is 47th in per capita income—\$512—and which is 46th in value of school property per pupil attendance—\$116—and which is 47th in per capita expenditure per student enrolled in the public schools—\$34.18, believes that Federal aid to education is neither necessary nor desirable.

"As taxpayers in Arkansas, we are fully aware that Arkansas' educational advantages are inadequate. We are determined that they shall be improved. We believe that Arkansas can and must reorganize and adequately support its own educational program.

"First, I want to show that Federal aid to Arkansas is unnecessary. In 1937, the Arkansas Department of Education sponsored a survey of the Arkansas School System at a cost to the Federal Government of \$80,000 (WPA). In its report this survey stated that a satisfactory school system could be operated in Arkansas on a total cost of \$17,000,000. Since that time Arkansas has increased her school revenue until now a total of more than \$20 million is going into the school system annually.

"This figure now has been further increased by the last legislature, which increased school revenue \$7 million for the next biennium, most of which goes to the public schools. Consequently, so far as money is concerned, and with the \$80,000 survey as a guide, we already have at least 25% more money than was considered necessary for a satisfactory school system. There has been some inflation since 1937, but according to the best available data it does not run as much as the 25% increase we already have above the amount of money then considered necessary for a satisfactory school system.

"Should more money be found necessary, however, Arkansas is able to pay more. For instance, the total Arkansas State revenue has increased from \$32 million in 1940 to \$45 million in 1945. State aid to education has already increased from \$6½ million in 1940 to \$11 million in 1944. Per capita income in Arkansas has increased more than 100 per cent. in the last four years.

"With the increasing industry in Arkansas, the income of the State bids fair to continue to increase rapidly.

"Since Mississippi and Arkansas are the two poorest States in the Union and since Arkansas is able to provide adequate educational facilities and since Mississippi created an \$11 million surplus last year, what I am saying for Arkansas, and which appears to be true of Mississippi, should be representative of all the States in the Union.

"While the States of the Union have been improving their economic status during the past fifteen years and while they have been decreasing their indebtedness, the Federal Government has been increasing its indebtedness by leaps and bounds. We will most likely close the war with a Federal debt of \$300 billion. So, with the Federal Government carrying such a super load and with the States in a greatly improved condition, it seems absurd to undertake to place on the Federal Government the burden of aiding education throughout the States. The States are much more able

to take care of their own educational needs than is the Federal Government.

"The most important need in Arkansas is not for more money but for a complete reorganization of the educational system. For instance, in June of 1944, there were actually 106 school districts in Arkansas with an enumeration of less than 10 pupils each. There were districts having less than 1 square mile in area, while others had 100 square miles. There were 350 districts having less than \$10,000 of assessed valuation, and 270 districts unable to raise as much as \$100 a year from local taxation. Additional funds are of little consequence unless such glaring irregularities are corrected. Federal aid would only pour in more money without correcting these weaknesses, which are retained because of political influence—an influence which Federal aid would likely tend only to increase.

"In the summer of 1944 the Arkansas Public Expenditures Council financed a comprehensive survey of the entire educational system of the State and again unbiased authorities commenced a reorganization of the school system. The Council offered to encourage the increased revenue for an effective educational system, provided these unfortunate conditions were corrected. In fact, a complete plan for reorganization was proposed by the Council, which would create larger districts, provide better transportation, better school facilities, and higher salaries for teachers. The proposal set a minimum of \$130 a month for teachers who were college graduates and a minimum of \$225 a month for school supervisors, of which there would be an adequate number. In spite of all these recommendations, reorganization has been effectively opposed. In one community six small districts with a total of 35 pupils, are transporting them all to a nearby town in six different buses at a cost of \$600 a month, when they could be transported in one bus at a total cost of \$150 a month. Again, I insist the real trouble in Arkansas is politics and not money. The people of Arkansas can reorganize their school system and can have an adequate school program and can finance it themselves.

"The real need is to set our own house in order, rather than ask for Federal aid to keep a disorderly house supplied with unnecessary funds.

"One of the greatest fallacies in regard to Federal aid is the implication that Federal aid does not cost the States anything, but that, on the contrary, they are receiving something for nothing.

"Should this bill become law it would probably cost Arkansas taxpayers over \$2 million a year. I believe one reason that so many people come rushing to Washington for relief in regard to local problems is because they have the impression that if they get it from Washington it costs nobody anything. This is a false impression which should by all means be corrected, before it wrecks our economic order.

"America's greatness lies in the fact that she is a Republic. Her greatness was achieved without centralized government. Under this republican form of government, which draws on the ingenuity of our entire population, and which has encouraged people to be self-reliant and to stand on

their own feet, we have developed an average per capita income two times greater than that of any European nation, and we have developed an educational system which is the admiration of the world.

"The present world trend is toward centralized government—toward collectivism. For a generation America has been following that same trend. Federal aid to public schools in America is another very direct step in that direction—a most critical step. Federal aid certainly carries the implication of Federal control. In fact, many people fear that some supporters of Federal aid to education have a greater desire for Federal control than they have for Federal aid.

"The fact that the present bill and other recent ones actually provide more money for New York and Pennsylvania than for Arkansas and Mississippi, and the fact that S. 717 includes church-related and parochial schools as well as public schools, indicates a view at least as much concerned with getting political support as with providing equal educational opportunity.

"A Supreme Court decision has already declared that the Federal Government may control that which it subsidizes. Consequently only a directive would be necessary at any time to establish Federal control over the public schools of the Nation after they have once become subsidized by the Federal Government.

"If our public school system is to remain a bulwark in defense of our republican form of government, it must remain close to the soil. Our grammar schools are nearest to the soil. They are controlled and operated from the bottom. Those whose only training has been there, want to keep America American. Our colleges are much more centralized and much further removed from the common people. It is in the field of higher education that so many men are reaching to the stars for guidance, with their feet no longer on the ground. Should our entire school system fall under Federal control, and thus under the leadership of enthusiastic planners, I believe we could expect the same influences over the whole of our youth as now prevail in certain of our institutions of higher learning. Then we would soon be making America over, perhaps somewhat after the Russian pattern, since I hear that advocated in higher education more than any other order. This, in my opinion, would be most disastrous, since the living standard in Russia has never risen to more than 25% of the American standard of living.

"Is there any more need, moreover, for Federal aid in education than in paying policemen, firemen and the clergy? The question involved is whether or not we want to keep a decentralized government with State rights and local responsibilities and local freedoms, or whether we want to become a highly centralized government with a regimented people. This, gentlemen, is the real issue involved. Federal aid to education is the key to the entire situation. Given Federal aid to education, we would soon have Federal control of education. Then, with that type of political influence predominant in the school system, we would soon have a public

wanting Federal control of everything, because people are what they are taught to be.

"Under a planned economy I believe our national income would fall off by fully 50%, and our wages by fully 50% and our standard of living by the same figure. I say this because no country in the world with a centralized government has yet achieved a standard of living one-half as high as our American standard—even though Russia has twice our resources.

"A very small percentage of the world's population has even enjoyed any reasonable measure of freedom or liberty or prosperity at any given time in the history of the world. With the eyes of the world upon America in this crucial period, our responsibility is great.

"May I call your attention to the fact that Greece achieved her best during the days of her democracy, that Rome achieved her best during the days of the Republic, and that England established her great empire following the days of the Magna Carta. America, under still greater freedom, and still greater liberty has achieved still greater power and prosperity. Individual freedom and prosperity go hand in hand, while regimentation and poverty likewise go hand in hand. I conclude by saying again, Federal aid is neither necessary nor desirable in public education in America. Moreover, Federal aid would, in my opinion, lead to a complete about-face in a system which has succeeded in making America the most desirable place in the world to live."

XVIII
Foreign Affairs



105. EXECUTIVE AGREEMENTS

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WORLD War II and the development of atomic power have convinced many Americans that foreign affairs are now the concern of every citizen. More than ever before the student of American government must be familiar with relations between the government of the United States and other world powers.

FOREIGN AFFAIRS



105. EXECUTIVE AGREEMENTS

How far can the President of the United States bind his country in foreign affairs? What is the difference between a "treaty" and an "executive agreement"? Henry S. Fraser, who served as Chief Counsel for the Petroleum Resources Committee of the Senate of the United States, throws light on these questions in the following reading.¹

THE CONSTITUTIONAL SCOPE OF TREATIES AND
EXECUTIVE AGREEMENTS

by Henry S. Fraser

On November 21, 1944, a subcommittee of the Senate Committee on Commerce was hearing the testimony of Green H. Hackworth, the legal adviser of the Department of State, who was contending that the instrument signed by the representatives of the United States and Canada on March 19, 1941, providing for the St. Lawrence seaway, is not a treaty but an executive agreement. The Senators were critical. The following colloquy between the chairman of the subcommittee and Mr. Hackworth took place:

Senator Overton. In other words, when heretofore this compact, which in its essence is the same as it was before, was submitted as a treaty by the executive department, then it was a treaty.

Mr. Hackworth. Certainly.

Senator Overton. Now, when you take the same compact and submit it as an executive agreement, or an agreement, as you wish to phrase it, then it becomes an agreement.

Mr. Hackworth. Sure.

Senator Overton. It boils down to this: If the President sent this down to the Senate as a treaty to be ratified it would be a treaty, but since he sent it down as an agreement it is an agreement.

Mr. Hackworth. That is right.

This colloquy takes on a vast significance when one reflects that the thesis of the legal adviser of the Department of State, carried to its logical

¹"The Constitutional Scope of Treaties and Executive Agreements" by Henry S. Fraser, *American Bar Association Journal*, Vol. 31 (June 1945); courtesy of the *Journal*.

conclusion, means that the President's view of the nature of every international contract would determine whether it is a treaty requiring for its consummation a vote of two-thirds of the Senators present, or whether it is an instrument of some other type not requiring such a vote. According to Mr. Hackworth's thesis, it is not the content, but the form, which is the criterion; hence, regardless of content, the instrument can be denominated by the President an "agreement" and the two-thirds rule be thereby made inapplicable.

This is startling doctrine. Let us examine it. Such examination is of acute importance irrespective of the expectation that the Dumbarton Oaks Proposals will be submitted to the Senate under the treaty-making power. There still remain numerous pressing subjects of international negotiation, touching commodities, aviation, finance, and other matters of world-wide importance.

Constitutional Intent

It would probably not be gainsaid by any lawyer that certain engagements, namely, "treaties," can come into being only with the cooperation of the Senate by means of its advice and consent under Article II, Section 2, of the Constitution. The critical inquiry focuses upon the meaning and scope of the word "treaties" as used in that Article, and the first step in the inquiry is to find out what the word meant in the eighteenth century when it was used by the Founding Fathers.

As early as the year 1700 Jacques Bernard published his well-known collection of treaties of peace, of truce, of neutrality, of suspension of arms, of confederation, of alliance, of commerce, of guaranty, and of other public acts, entered into between the rulers of Europe and of other parts of the world since the birth of Christ until the end of the seventeenth century. Between the years 1726 and 1731 there appeared the famous treaty collection in eight volumes by Jean Dumont, covering the period since the reign of Charlemagne. In 1739 the distinguished publicist, Barbeyrac, brought out his history of ancient treaties. These collections were familiar and current in the day of their publication and have been the indispensable tools of statesmen and scholars ever since.

An examination of the treaties contained in these eighteenth-century collections reveals a wide variety of international engagements relating to very numerous subjects. Thus, Barbeyrac lists many types of ancient treaties prevalent in the Greek and Roman world, in part as follows: Treaties of amity; treaties for offensive and defensive alliance, or defensive only; perpetual confederations of several peoples; perpetual councils among these types of allies; treaties among allies for the command of armies, or for the choice of a general; treaties to terminate disputes by means of arbitration or mediation; treaties for fixing boundary limits; treaties relating to commerce; treaties of common citizenship between two or more peoples; treaties of sale, cession, or gift of some city

or territory; treaties for the passage or retreat of an army; treaties by which it was permitted that a people or king receive banned individuals or refugees from one country to the other; treaties to deliver up someone; treaties for a truce, either short or long, of 30, 40, 50, or even 100 years; treaties of capitulation or settlement; treaties of peace; treaties for tribute of different kinds; secret treaties or secret articles of an otherwise public treaty; etc.

Of the treaties of the eighteenth century up to 1731, Dumont lists more than 225. These treaties relate to alliances, arbitration, commerce, navigation, slave trade, terms of peace, partition of territory, contraband, liberty of conscience, guaranty, indemnity, religion, neutrality, transfer of territory, truce, armistice, boundaries, etc.

Likewise famous in that day as in this, and frequently cited in the writings of the Founding Fathers, were the classic works on international law by Grotius and Vattel, to mention but two. Both publicists discoursed at length on the subject of treaties, the latter seeking to distinguish treaties from other agreements by virtue of a treaty's continuing and executory character—a not entirely satisfactory distinction since boundary treaties, for example, may be executed by a single act.

As statesmen the Framers of the Constitution were necessarily familiar with the many treaties of the day, covering, in addition to those enumerated above in Dumont's work, such subjects as aliens, bills of credit, bullion, extradition, fisheries, fortifications, mercenaries, prizes, smuggling, waterways, consuls, etc. The Framers of the Constitution were also necessarily familiar with the not inconsiderable number of treaties to which the thirteen United States were a party during the Revolutionary War and immediately thereafter.

In addition to the foregoing evidence bearing on the intent of the Constitutional Convention in its use of the term "treaties," we have the direct statement, not often quoted, of Hamilton in one of the "Camillus" letters:

"As to the sense of the convention, the secrecy with which their deliberations were conducted, does not permit any formal proof of the opinions and views which prevailed in digesting the power of treaty. But from the *best opportunity of knowing the fact*, I aver, that it was understood *by all*, to be the intent of the provision to give to that power the most ample latitude—to render it competent to all the stipulations, which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations; and competent, in the course of its exercise for these purposes, to control and bind the legislative power of Congress. And it was emphatically for this reason, that it was so carefully guarded; the cooperation of two-thirds of the Senate, with the President, being required to make any treaty whatever. I appeal for this, with confidence, to every member of the convention—particularly to those in the two houses of Congress."

Joint Resolutions

An examination of the juridical effect of treaties and executive agreements will throw further light on their respective functions and constitutional scope. But before touching on that phase of the subject it may be helpful to dispel the illusion that the congressional joint resolution is related to the executive agreement. On occasion the Congress by joint resolution has accomplished an end that might have been achieved by treaty. So long as the legislation is within the delegated or implied powers of Congress, there would appear no constitutional objection to this method. Joint resolutions, however, are not to be confused with executive agreements. The former do not constitute compacts with foreign governments and may be repealed without violating any international obligation. On the other hand, the executive agreement, when valid, creates an international obligation. Although joint resolutions are sometimes cited in support of the power of the President to enter into many kinds of executive agreements, his power in that respect must be found *dehors* legislation of Congress—namely, in his diplomatic or military powers granted by the Constitution. The instances where the joint resolution has been employed to accomplish ends that could have been had through the treaty process do not, upon analysis, reveal any added power in the President. The resolution may have served to indicate to the President that certain action to be taken by him *vis-a-vis* a foreign government would not encounter opposition from Congress and would have support when the time came to appropriate funds, but the power to agree with a foreign government cannot be delegated by Congress because Congress itself has not that power.

Other Distinctions

Nor should confusion arise, as it sometimes has, when Congress is called upon to pass an act or joint resolution which may be uniform with that in another country, or which may operate as an invitation to that country to pass some legislation desired by Congress. If the Congress proceeds under its constitutional powers, the statute would stand on its own feet. In this connection one will recall the attempt at reciprocal tariff legislation in this country and Canada in 1911.

Nor should confusion arise as to the judicial decisions (*e. g.*, *Field v. Clark*, 143 U. S. 649) sanctioning the method whereby Congress conditions the operation of a statute upon a presidential act or finding in the form of an executive agreement with a foreign government. These decisions do not go so far as to hold that the executive agreements were valid under the President's constitutional powers, but merely hold that legislation contingent upon the action or finding of the President may take effect at that moment.

Juridical Effects

Turning to the juridical effect of treaties and executive agreements as internal law, we find that the Supreme Court has construed the supremacy

clause of Article VI of the Constitution to mean not only that a treaty will prevail over the constitution and laws of a state, but also that a treaty may deal with powers reserved to the states under the Tenth Amendment if proper subjects for international negotiation. Hence, it follows both from the provisions of the Constitution relating to treaties and from judicial decisions thereunder that if it be desired that an international covenant shall operate as overriding law, the covenant must be a treaty unless the covenant is made by the President (a) within his diplomatic powers, or (b) within his powers as Commander in Chief of the Army and Navy, in either of which cases, as will presently appear, the covenant may be an executive agreement which, like a treaty, will operate as supreme law.

Diplomatic Power

Thus, the President in recognizing a foreign government, a diplomatic matter, may as part of the same transaction agree to the settlement of outstanding claims and counterclaims of American and foreign nationals. The Supreme Court so held, New York policy to the contrary notwithstanding, in respect of the Litvinov Assignment accompanying the formal recognition of the Russian Government, which were held to be interdependent acts (*United States v. Belmont*, 301 U. S. 324; *United States v. Pink*, 315 U. S. 203). Since the President by virtue of his diplomatic powers is the "sole organ of the federal government in the field of international relations" (*U. S. v. Curtiss-Wright Corp.*, 299 U. S. 304, 320), he must be deemed to have the implied power to remove such obstacles to full recognition as the settlement of the claims of American nationals. Moreover, the President undoubtedly has the diplomatic power by executive agreement, apart from the circumstance of recognition of a foreign government, to settle or refer to arbitration a pecuniary claim of an American citizen against a foreign state, although there may be some doubt as to such procedure where the foreign state is in a plaintiff position and the arbitral award may require an appropriation for its fulfillment.

Military Power

Likewise under the President's power as Commander in Chief of the Army and Navy, he may make executive agreements. As instances of familiar agreements that may be subsumed under the military power there may be cited the agreement of 1882 with Mexico, by means of an exchange of notes, for the passage of troops of either country across the border when pursuing Indians; the agreement of 1817 with Great Britain for the limitation of naval armaments on the Great Lakes (although, as a matter of fact, the agreement was later submitted to the Senate and received its approval in a resolution in which two-thirds of the Senators present concurred); the protocol with Spain in 1898 providing for an armistice and stipulating as to the evacuation of Cuba, Porto Rico, and other islands in the West Indies; and the recent agreement for the transfer of destroyers in exchange for the use of certain British naval and air bases.

Limits of Agreements

The question next arises as to the external phase of the executive agreement. Whether the United States may be bound under international law by an executive agreement depends upon its nature. If the agreement is of the type just described, stemming from the diplomatic or military powers of the President, it will bind this country under international law. Or if the agreement is of a type that has been customarily made by the Chief Executive subsequent to the adoption of the Constitution without submission to the Senate, it may, particularly in the light of certain recent judicial *dicta* relating to treaties and the "reserved powers," be too late to question the international obligation. However, and apart from these considerations, if the subject matter corresponds with or is analogous to that which was ordinarily cast in treaty form by the nations of the world when the Constitution was adopted, it must still be cast in treaty form. If this be not so, the clause of the Constitution relating to the making of treaties would cease to have any force, and the President would have complete discretion to employ either a treaty or an executive agreement, whichever would be more pleasing, whenever he desired to create an international obligation on the part of this country.

There has been a considerable variety of executive agreements made by the Presidents of the United States over a long period. They have covered many fields, some of major importance but more of minor significance. Apart from agreements clearly referable to the diplomatic or military powers of the President, there have been agreements pertaining to the quarantine inspection of vessels, exemption of pleasure yachts from navigation dues, loadline certificates, issuance of licenses to pilots, admission of civil aircraft, postal conventions, waiver of visa fees, debt funding, trade marks, copyrights, exchange of information concerning narcotic drugs, etc.

It may be that in some of these instances the Supreme Court would uphold the agreement, insofar as the international obligation is concerned, despite the lack of approval of the agreement by the Senate. The Court, in dealing with the Litvinov Assignment, added the *dictum* that there are many international compacts which do not require the participation of the Senate, "of which a protocol, a *modus vivendi*, a postal convention, and agreements like that now under consideration are illustrations" (*United States v. Belmont, supra*). On the other hand, and at the least, in instances of agreements where no rational doubt exists as to the fact that their subject matter is of the general type embodied in treaty form in the eighteenth century, when the Constitution was adopted, there would appear no reason to assume that the Supreme Court would exempt them from the requirement of submission to the Senate before recognizing their validity in international law, or *a fortiori* their validity as municipal law. The Court has recently said that it "may not, and should not, hesitate to declare acts of Congress, however many times repeated, to be un-

constitutional if beyond all rational doubt it finds them to be so" (*U. S. v. Curtiss-Wright Corp.*, *supra*). And it may safely be assumed that the validity of executive agreements would be approached in the same attitude, unless, to be sure, the Court in a given case should regard the President's act as political and therefore not subject to judicial scrutiny.

Although prepared to strike any statute if clearly invalid, the Supreme Court in the same case went on to say that "an impressive array of legislation, . . . enacted by nearly every Congress from the beginning of our national existence to the present day, must be given unusual weight in the process of reaching a correct determination of the problem. A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined." The Court then found that the "uniform, long-continued and undisputed legislative practice just disclosed rests upon an admissible view of the Constitution which, even if the practice found far less support in principle than we think it does, we should not feel at liberty at this late date to disturb."

Therefore, by parity of reasoning, if there can be shown an undisputed practice of long standing on the part of the President to make certain types of executive agreements, it might be that the Supreme Court would not deny effect thereto. For example, in the case of postal conventions, an Act of Congress in 1792 (1 Stat. 232, 239) empowered the Postmaster General to "make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices." Under this and later statutes of like tenor the Postmaster General entered directly into the agreements indicated. Since 1872, pursuant to a statute of that year, postal conventions have been made by the Postmaster General "by and with the advice and consent of the President" (17 Stat. 283, 304). Although it might be said that these statutes merely provided for a permissible delegation of power by virtue of the constitutional authority of Congress to establish post offices and post roads, or merely authorized business arrangements between offices of transport, yet it might also be urged that postal conventions are true executive agreements which by long and undisputed usage have gained a validity which possibly would not attach were the question *res integra*. And perhaps the same could be demonstrated in other fields where executive agreements have been common over a long period.

But in the absence of such a custom as would gain the sanction of the Supreme Court, or in the absence of an exercise of the diplomatic or military powers of the President, the conclusion would seem inescapable that, in the phrase of Hamilton, every species of convention usual among nations at the time of and since the adoption of the Constitution must be embodied in a treaty, unless, forsooth, the time has come to connive at

breaches of the Constitution and to assert that what was known as a treaty to the Framers of the Constitution may now be transmuted into an executive agreement, and that, if the President so wills, no treaty need ever again be submitted to the Senate. The intention of the men who founded this Government was quite otherwise.

106. CHARTER OF THE UNITED NATIONS AND STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

The text given below is taken from Publication 2353, Conference Series 74, of the Department of State. The Charter was signed at the United Nations Conference on International Organization, at San Francisco, California, June 26, 1945.

CHARTER OF THE UNITED NATIONS

We the people of the United Nations determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom.
and for these ends

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and

to employ international machinery for the promotion of the economic and social advancement of all peoples,

have resolved to combine our efforts to accomplish these aims.

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I

PURPOSES AND PRINCIPLES

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and

4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II

MEMBERSHIP

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

CHAPTER III

ORGANS

Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social

Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

2 Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV

THE GENERAL ASSEMBLY

COMPOSITION

Article 9

1. The General Assembly shall consist of all the Members of the United Nations.

2. Each Member shall have not more than five representatives in the General Assembly.

FUNCTIONS AND POWERS

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:

a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1 (b) above are set forth in Chapters IX and X.

Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an

account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

VOTING

Article 18

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1 (c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the

amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

PROCEDURE

Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

Article 22

The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

CHAPTER V

THE SECURITY COUNCIL

COMPOSITION

Article 23

1. The Security Council shall consist of eleven Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect six other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members, however, three shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

FUNCTIONS AND POWERS

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII:

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

VOTING

Article 27

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

PROCEDURE

Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI

PACIFIC SETTLEMENT OF DISPUTES

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recom-

mendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE,
BREACHES OF THE PEACE, AND ACTS OF AGGRESSION*Article 39*

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a

special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII

REGIONAL ARRANGEMENTS

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX

INTERNATIONAL ECONOMIC AND SOCIAL COOPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

Article 58

The Organization shall make recommendations for the coordination of the policies and activities of the specialized agencies.

Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and,

under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

CHAPTER X

THE ECONOMIC AND SOCIAL COUNCIL

COMPOSITION

Article 61

1. The Economic and Social Council shall consist of eighteen Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, six members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election, eighteen members of the Economic and Social Council shall be chosen. The term of office of six members so chosen shall expire at the end of one year, and of six other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

FUNCTION AND POWERS

Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

VOTING

Article 67.

1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

PROCEDURE

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.
2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER XI

DECLARATION REGARDING NON-SELF-GOVERNING
TERRITORIES*Article 73*

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

CHAPTER XII

INTERNATIONAL TRUSTEESHIP SYSTEM

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples

and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms

of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval

of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XIII

THE TRUSTEESHIP COUNCIL

COMPOSITION

Article 86

1. The Trusteeship Council shall consist of the following Members of the United Nations:

- a. those Members administering trust territories;
- b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and
- c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

FUNCTION AND POWERS

Article 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

- a. consider reports submitted by the administering authority;
- b. accept petitions and examine them in consultation with the administering authority;
- c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
- d. take these and other actions in conformity with the terms of the trusteeship agreements.

Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

VOTING

Article 89

1. Each member of the Trusteeship Council shall have one vote.
2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

PROCEDURE

Article 90

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.
2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

CHAPTER XIV

THE INTERNATIONAL COURT OF JUSTICE

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.
2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

CHAPTER XV

THE SECRETARIAT

Article 97

The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

CHAPTER XVI

MISCELLANEOUS PROVISIONS

Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

CHAPTER XVII

TRANSITIONAL SECURITY ARRANGEMENTS

Article 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Moscow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

Article 107

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

CHAPTER XVIII

AMENDMENTS

Article 108

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109

1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

CHAPTER XIX

RATIFICATION AND SIGNATURE

Article 110

1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern

Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

Article 111

The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

IN FAITH WHEREOF the representatives of the Governments of the United Nations have signed the present Charter.

DONE at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

Article 1

THE INTERNATIONAL COURT OF JUSTICE established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

CHAPTER I

ORGANIZATION OF THE COURT

Article 2

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence in international law.

Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could

be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a state which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the states which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same state obtaining an absolute majority of the votes both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

Article 13

1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation shall be addressed to the President of the Court for transmission to the Secretary-General. This last notification makes the place vacant.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 15

A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Article 16

1. No member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.

2. Any doubt on this point shall be settled by the decision of the Court.

Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.

Article 18

1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

2. Formal notification thereof shall be made to the Secretary-General by the Registrar.

3. This notification makes the place vacant.

Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.

Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.

2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

2. The President and the Registrar shall reside at the seat of the Court.

Article 23

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

2. Members of the Court are entitled to periodic leave, the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on leave or prevented from attending by illness or other serious reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Article 26

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labor cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this Article if the parties so request.

Article 27

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Article 28

The chambers provided for in Articles 26 and 29 may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague.

Article 29

With a view to the speedy despatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing judges who find it impossible to sit.

Article 30

1. The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.

4. The provisions of this Article shall apply to the case of Articles 26 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.

6. Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Article 32

1. Each member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges chosen under Article 31, other than members of the

Court, shall receive compensation for each day on which they exercise their functions.

5. These salaries, allowances, and compensation shall be fixed by the General Assembly. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their traveling expenses refunded.

8. The above salaries, allowances, and compensation shall be free of all taxation.

Article 33

The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly.

CHAPTER II

COMPETENCE OF THE COURT

Article 34

1. Only states may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

1. The Court shall be open to the states parties to the present Statute.

2. The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

3. When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the

teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

CHAPTER III.

PROCEDURE

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

3. He shall also notify the Members of the United Nations through the Secretary-General, and also any other states entitled to appear before the Court.

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Article 43

1. The procedure shall consist of two parts: written and oral.
2. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.
3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.
4. A certified copy of every document produced by one party shall be communicated to the other party.
5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

Article 44

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the state upon whose territory the notice has to be served.
2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Article 47

1. Minutes shall be made at each hearing and signed by the Registrar and the President.
2. These minutes alone shall be authentic.

Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Article 53

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Article 54

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

2. The Court shall withdraw to consider the judgment.

3. The deliberations of the Court shall take place in private and remain secret.

Article 55

1. All questions shall be decided by a majority of the judges present.

2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Article 56

1. The judgment shall state the reasons on which it is based.
2. It shall contain the names of the judges who have taken part in the decision.

Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

Article 62

1. Should a state consider that it has an interest of a legal nature

which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.

2. It shall be for the Court to decide upon this request.

Article 63

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

CHAPTER IV

ADVISORY OPINIONS

Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

Article 67

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

Article 68

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

CHAPTER V

AMENDMENT

Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

107. SUPER-STATE AND THE INDIVIDUAL

Does the nation-state today chain its subjects to the soil as feudal landowners did their serfs in past centuries? Are free trade and national sovereignty incompatible? Will industrialism and nationalism inevitably lead to fascism? The book ¹ from which the following reading is taken is well worth reading in its entirety.

¹ *The Anatomy of Peace* by Emery Reves (Harper & Brothers); copyright by author; Chapter X reprinted by permission.

The author, Emery Reves, was born in Hungary (1904). He is a citizen of Great Britain; is founder and president of the Cooperation Press Service. He came to the United States in 1941 and established the Cooperation Publishing Company.

by Emery Reves

In our modern industrial world, nation-states are not only the greatest obstacle to world peace. More and more they are the destroyers of the most cherished individual liberties in a democracy.

We have seen:

1. That in all stages of history, social units of equal sovereignty in contact inescapably get into conflict and war.
2. That a phase of human history marked by a series of clashes between a particular type of equal sovereign units comes to a close when sovereign power is transferred from the conflicting groups to a higher unit.
3. That a transitory period of relative peace follows each such transfer of sovereignty.
4. That a new cycle of wars begins as soon as the new units of equal sovereignty come into contact with each other.

These cycles of peace and war in human society through transfers of sovereignty from existing, conflicting social units to higher units, run parallel with the development of individual human freedom.

Whenever, through human effort—evolution or revolution—individual freedom in varying degrees was achieved and granted within existing social units, these liberties flourished only until the social units in which they were established came into contact with other units of equal sovereignty. Once such contacts became effective they inevitably resulted in friction and conflict between the units, and they inevitably led to the limitation, restriction and finally, to the destruction of individual freedom, in the interest of the presumed security and the power of the social unit as a whole.

This development can be observed in the history of primitive tribes, of the Greek and Renaissance city-states, of mighty empires, of world religions, of great economic enterprises and of modern nation-states.

The present trend toward strengthening central government power to the detriment of individual liberty within the modern nation-states is a trend identical with this evolution during many phases of history in all parts of the world. It is a permanent phenomenon in human development. Contacts between social units create competition, arouse jealousies, foster conflicts and lead to violent clashes which, in turn, react by creating a tendency toward centralized power and crushing individual liberty in every sovereign unit within this sphere of contact.

In this era so prodigiously prolific of secret weapons and political slogans, another concept has been launched by the enemies of progress,

a concept destined to become the object of passionate debate. This term is: super-state. It sounds terrifying. All men of healthy instincts are supposed to react in unison: We will have none of it!

Any attempt to establish a legal order beyond the boundaries of the present nation-states is to be discredited and defeated by the rhetorical question: "Do you want to live in a super-state?"

What is a super-state? Is a super-state a state of vast dimensions? Or is it a state with an overlarge population? Or is it a too-powerful state?

Since the beginning of thought, writings about the nature and the problems of the state in human society would fill whole libraries. In this century-old search for the truth about the state, two conceptions have crystallized. One is the theory that the state is an end in itself, the purpose of society, the ultimate goal. Individuals have to obey the dictates of the state, submit to the state's rules and laws, with no right of participation in their creation. Without the state the individual cannot even exist. This conception of the state found expression in autocratic kingdoms and empires throughout history. Since the destruction of most of the absolute monarchies, it has returned in our age in the form of Fascism, Nazism, the dictatorship of a single party or military caste.

The other conception of the state—the democratic conception—sees the ultimate goal in the individual. According to the democratic theory of the state, the individual has certain inalienable rights, sovereignty resides in the community, and the State is created by the people who delegate their sovereignty to state institutions for the purpose of protecting them—their lives, their liberties, their properties—and for maintaining law and order within the community.

Our ideal is the democratic state. The state we want to live in is one which can guarantee us maximum individual liberty, maximum freedom of religion, speech, press and assembly; maximum freedom of communication, enjoyment of scientific progress and material wealth. We want the state to restrict and control these individual freedoms only to the extent to which innumerable free individual actions interfere with each other and make necessary regulation of the interdependence of individuals within a society—a legal order. Throughout the whole nineteenth century, such has been the development of the great democratic nations toward greater wealth and more individual freedom.

But this development reached its zenith at the beginning of the twentieth century, when industrial progress began to overflow and undermine the structure of the eighteenth century nation-state. In order to reinforce the structure, in every one of the nation-state units, artificial measures had to be taken on a scale that could only be undertaken by governments. A development started which, in the greater part of the world, led to the complete destruction of all individual liberty.

In some countries like Germany, Italy and Spain, this change was undertaken openly and purposely by suppressing individual liberty, and

by proclaiming the principle that salvation lies in the all-powerful totalitarian nation-state endowed with the right to dispose of the very lives of its citizens.

In other countries, like the United States, Great Britain, France, the development has been slow, gradual and against our will. We have continued to uphold democratic ideology but little by little we have given up more and more of our individual liberty to strengthen our respective nation-states. It is immaterial which parties were in power and were instrumental in bringing about these changes. Right and Left, conservative, liberal, socialist, capitalist and Communist forces evolved in the same direction. It is wide of the mark to blame any government or any political party for the growing centralization of state administration. The trend is irresistible. Any other governments or parties in power would have been forced to take the same measures in their struggle against involvement in foreign wars with other nation-states and in their fight against violent social conflicts at home.

Under the double threat of imminent and inescapable war, as pressure from outside, and growing social conflicts, economic crises and unemployment, as pressure from inside, it was and is imperative for each nation to strengthen its state by instituting or expanding military service, by accepting higher and higher taxation, by admitting more and more interference of the state in the everyday life of the individual. •

This trend seems the logical result of the present conflict between the body politic and the body economic in our nation-states. In a world which industry and science have transformed into a single huge entity, our political ideologies and superstitions are hindering growth and movement.

Violent conflicts between nations are the inevitable consequence of an ineffective and inadequate organization of relations between the nations, and we shall never be able to escape another and another world war so long as we do not recognize the elementary principles and mechanics of *any* society.

It is a strange paradox that at any suggestion of a world-wide legal order which could guarantee mankind freedom from war for many generations to come, and consequently individual liberty, all the worshipers of the present nation-states snipe: "Super-state!"

The reality is that the present nation-state has become a super-state.

It is this nation-state which today is making serfs of its citizens. It is this state which, to protect its particular vested interests, takes away the earnings of the people and wastes them on munitions in the constant fear of being attacked and destroyed by some other nation-state. It is this state which, by forcing passports and visas upon us, does not allow us to move freely. It is this state, wherever it exists, which by keeping prices high through artificial regulations and tariffs, believing that every state must be economically self-supporting, does not permit its citizens to enjoy the fruits of modern science and technology. It is this state which interferes

more and more with our everyday life and tends to prescribe every minute of our existence.

This is the "super-state"!

It is not a future nightmare or a proposal we can freely accept or reject. We are living within it, in the middle of the twentieth century. We are entirely within its orbit, whether in America, in England, in Russia or Argentina, in Portugal or Turkey.

And we shall become more and more subject to this all-powerful super-state if our supreme goal is to maintain the nation-state structure of the world. Under the constant threat of foreign war and under the boiling pressure of economic problems, insolvable on a national basis, we are forced to relinquish our liberties, one after the other, to the nation-state because in final analysis our tribalism, our "in-group drive," our nationalism, is stronger than our love of freedom or our economic self-interest. At the present stage of industrialism, the nation-states can maintain themselves in one way alone: by becoming super-states.

The super-state which we all dread and abhor cannot be qualified by the territory over which it extends or by the number of citizens over which it has authority. The criterion of a super-state can be only the degree to which it interferes with individual liberties, the degree of collective control it imposes on its citizens.

The Italy of Mussolini in 1925 was much more a "super-state" than the United States of Coolidge, although the latter was twenty-five times larger. Tiny Latvia, under the dictatorship of Ulmanis, was much more a "super-state" than the Commonwealth of Australia, covering a whole continent.

We cannot have democracy in a world of interdependent, sovereign nation-states, because democracy means the sovereignty of the people. The nation-state structure strangulates and exterminates the sovereignty of the people, that sovereignty which, instead of being vested in institutions of the community, is vested in sixty or seventy separate sets of sovereign nation-state institutions.

In such a system, the sovereignty of each group tends to cancel out the sovereignty of the others, as no institution of any one group can ever be sovereign enough to protect its people against the infringements and dangers emanating from the fifty-nine or sixty-nine different sets of institutions in the other sovereign groups.

Absolute national sovereignty, as incarnated by our national governments, could operate satisfactorily only in a condition of complete isolation. Once a situation exists in which several sovereign nation-states are in contact with each other, their inevitably growing interdependence, their ever-closer relations completely modify the picture. In a world of sixty or seventy sovereign nation-states, the real sovereign power of a nation to determine—independently from influences radiating from other sovereign nation-states—its own course and its own actions is reduced to a minimum. The tendency within such an interdependent system is to reduce to zero,

to cancel completely and to annul any real sovereignty or self-determination of the conflicting national units.

At the present stage of industrial development, there can be no freedom under the system of sovereign nation-states. This system is in conflict with fundamental democratic principles and jeopardizes all our cherished individual freedoms.

As the sovereign nation-states cannot prevent war, and as war is becoming an indescribable calamity of ever-longer duration, we are periodically called upon to sacrifice everything for sheer survival.

We cannot say that our individual freedom is guaranteed if every twenty years all our families are torn apart and we are forced to go forth to kill or be killed.

We cannot say that our welfare and economic freedom are guaranteed when every twenty years we have to stop production of consumer goods and waste all our energies and resources in the manufacture of the tools of war.

We cannot say that we have freedom of speech and the press when every twenty years conditions force censorship upon us.

We cannot say that private property is guaranteed if every twenty years gigantic public debts and inflation destroy our savings.

Defenders of national sovereignty will argue that all these restrictions and suppressions of individual liberty are emergency measures, necessitated by the exigencies of war and cannot be regarded as normal.

Of course, they are emergency measures. But as the nation-state structure, far from being able to prevent war, is the only and ultimate cause of the recurrent international wars, and as the aftermath of each of these international wars is simultaneously the prelude to the next violent clash between the nations, eighty or ninety per cent of our lives are spent in times of "emergency." Under existing conditions, periods of emergency are the "normal" and not the "abnormal."

If we want to stick to the obsolete conception of nation-states, which cannot prevent wars, we shall have to pay for worshipping this false goddess with the sacrifice of all our individual liberties, for the protection of which, ironically, the sovereign nation-states were created.

World wars such as have been twice inflicted on this generation cause such major catastrophes, are so horribly costly in human life and material wealth that before all else we must solve this central problem and establish freedom from fear. It is a foregone conclusion that unless we do this we cannot have and shall not have any of the other freedoms. Within a nation-state, as within a cage, freedom of action, individual aspirations, become a mockery.

It is all the more important to recognize the primordial necessity of a universal, political and legal order because there is not the slightest possibility that we can solve any one of our economic or social problems in a world divided into scores of hermetically sealed national compartments. The interrelationship and interdependence of the nations are so

evident and so compelling that whatever happens in one country immediately and directly affects the internal life of all the other countries.

It is pathetic to watch the great laboring masses of common men aspire to better conditions, higher wages, better education, more leisure, better housing, more medical care and social security, while they struggle under the most appalling conditions. There can be no question that these are the real problems of the overwhelming majority of men and women and it is perfectly comprehensible that the ambitions and desires of hundreds of millions are focused on these issues.

Yet, the very fact that these problems are everywhere regarded as national matters, problems which can be solved by national governments through national institutions, makes these aspirations unattainable dreams. In themselves, they are within the reach of reality. Scientific and technological progress have brought them to our very door. For a fraction of the time, money, thought and labor wasted on international wars, social and economic conditions could be transformed beyond recognition. But under the certain threat of recurrent wars, all these social aspirations of the people are being indefinitely postponed. Even if in one country or other legislation to this effect is enacted, it will be crushed and buried by the next global war, like mountain huts by an avalanche.

Full employment within the compartmented political structure of sovereign nation-states is either a myth or Fascism. Economic life can develop on a scale to provide work and goods for all only within a world order in which the permanent threat of war between sovereign nation-states is eliminated, and the incentive to strengthen the nation-states provided by the constant fear of being attacked and destroyed is replaced by the security that a legal order alone creates.

Social and economic problems are essentially problems of a Copernican world, insolvable with nation-centric, Ptolemaic means.

National leaders seriously declare in one breath that we must maintain untrammelled national sovereignty, but that we must have free trade between the nations.

Free trade without free migration is an economic absurdity, a mathematical impossibility.

But the nation-states, like feudal knights, are chaining their subjects to the soil of their homeland, refusing them that most elementary of freedoms, the freedom of movement. The interference of the nation-states in this field of human liberty is identical with the absolute rule of the feudal landowners over their serfs. The system of passports, visas, exit permits, immigration quotas, is incompatible with free economic exchange.

Were it possible to assign to nations the economic roles they must play, like casting a theatrical production, the problem of international trade would be simple. If Spain could be persuaded to concentrate on growing oranges, Brazil on producing coffee, the Argentine on raising beef, France on manufacturing luxuries, Great Britain on weaving textiles and the United States on making automobiles, it would be relatively easy to

persuade people of the advantages of a free and unhampered exchange of products between the nation-states.

But the economic roles thus allotted to the nations are not equally important or equally profitable from a political point of view, and therefore each national unit naturally tends to produce everything possible at home. There is not the slightest chance that the United States will ever stop producing grain and meat so that Canada and the Argentine may freely export their grain and meat products to the United States. Nor will Great Britain and France ever agree to stop building ships and motorcars so that United States shipyards and industrial plants may freely sell their products all over the world.

Once a certain number of closed national units are in existence, each producing a certain amount of almost every commodity, and once each sovereign nation is dominated by the idea of strengthening its national economic machinery, freedom of exchange between these units becomes impossible without the stronger producer nation dominating the weaker. Free trade between such divided national economies would inevitably cause shutdowns in a great number of industries in many of the countries and would make it impossible for several countries, working under less favorable conditions, to sell their agricultural products.

Such a calamity—brought about by the sudden abolition of tariff walls between the sovereign nation-states—could be remedied only if the masses, as they became unemployed in certain parts of the world, were free to migrate to those places where the freedom of competition resulting from the abolition of tariffs, would create prosperity and new opportunities for employment and investment in specific fields.

If the nations maintained the existing restrictions on migration, abolition of protective tariffs would bring about conditions in many nations which no sovereign nation-state could nor indeed ever would accept and sanction.

The Malthusian superstition regarding immigration that exists in all the nations of the world is so strong today that it is impossible to imagine the sovereign nation-states easing their rigid policies aimed at prohibiting immigration.

The fallacy that immigration above all creates pressure on the labor market, lower wages and unemployment is so deep-rooted; the failure of the still underpopulated new countries to realize that, on the contrary, wealth is created by man is so striking, that freedom of migration between sovereign nation-states is politically unrealizable. Without it, freedom of trade between sovereign nation-states is unimaginable.

Free trade cannot function *between* sovereign units. To have free trade between larger territories, we must first eliminate the obstacle of political frontiers dividing the peoples.

Another *conditio sine qua non* of a free world economy—which alone can produce under present-day conditions enough wealth to secure economic freedom—is a stable currency. It is a truism that a well-

functioning, highly rationalized and integrated economy requires a stable standard of exchange. But this elementary problem has never been satisfactorily solved and can never be solved within the political nation-state framework.

Without a stable and generally accepted standard, no national economy could have developed as it actually did. And no further progress in international economy is thinkable without a universally accepted, stable standard of exchange.

Every few years, the entire system of international trade gets out of gear because of some difficulty in the peculiarly constructed world monetary system. Currency is a jealously guarded attribute of national sovereignty and each nation-state insists upon having its own national currency and determining its value as it pleases, by internal, national, sovereign decision.

So it is a terrible and constantly recurring problem how to "stabilize" the exchange rates between the United States and France, between England and Spain, between each and any of the national sovereign economic units.

But it is no problem at all to keep the currency in permanent relationship between Michigan and South Carolina, between Cornwall and Oxfordshire. The reason is very simple. One single currency is in circulation.

Economists and statesmen say that such a solution could never be applied between nations because their living standards are not on the same level and rich countries would suffer from any monetary union. This economic commonplace hardly stands examination. The difference in wealth between nations is no greater than the difference in living standards between the South Carolina tobacco farmers and the Detroit industrialists in the United States, the Breton fishermen and the Parisians in France, or between rich and poor regions to be found inside any nation.

The fact is that, just as unified national currency was necessary to facilitate the development of national economies up to their present level, so a unified world currency is the indispensable condition for further development of world economy from the present stage on.

"International monetary agreements," "stabilization funds," "international banks," "international clearing houses," "international barter arrangements" can never create stability of exchange rates. If we maintain scores of different national currencies, each an instrument of sovereign national policy, no amount of banking acrobatics can ever keep them balanced, as each sovereign nation will at all times regard its own national economic interests as more important than the necessity of international monetary stability.

The complicated machinery of world economy, world-wide production, world-wide use of raw materials, distribution on the world markets, demands a stable standard of exchange that only a single world currency can provide. As long as it is the sovereign attribute of sixty or seventy social units to cheat each other by selling a hundred yards of cloth in exchange for fifty pairs of shoes and then, by a national sovereign decision,

to reduce the length of the yard from three feet to two feet, there is no hope for freedom in world economic exchange.

No matter how it hurts our most cherished dogmas, we have to realize that in our industrialized world, the greatest threat to individual liberty is the ever-growing power of the national super-state.

As a direct result of national sovereignty, we are living today in the worst kind of dependency and slavery.

The rights of the individual and human liberty, won at such a cost at the end of the eighteenth century through the overthrow of personal absolutism, are more or less lost again. They are on the way to being completely lost to the new tyrant, the nation-state.

The fight for liberty—if it is liberty we want—will have to be fought anew, from the very beginning. But this time it will be infinitely harder than it was two centuries ago. Now we have to destroy, not men and families but tremendously strong, mechanized, sacrosanct, totalitarian institutions.

Those who will fight for the lost freedom of man will be persecuted by the nation-states more ruthlessly and cruelly than were our forefathers by the absolute monarchs.

108. TRUMAN DOCTRINE

Did the United States extend the "Monroe Doctrine" to Europe in 1947? Is such a step indicated in the following address of President Truman taken from the *Congressional Record*, Vol. 93, Part 2 (March 12, 1947)?

ADDRESS OF THE PRESIDENT OF THE UNITED STATES— GREECE, TURKEY, AND THE MIDDLE EAST (H. DOC. NO. 171)

The PRESIDENT. Mr. President, Mr. Speaker, Members of the Congress of the United States, the gravity of the situation which confronts the world today necessitates my appearance before a joint session of the Congress.

The foreign policy and the national security of this country are involved.

One aspect of the present situation, which I wish to present to you at this time for your consideration and decision, concerns Greece and Turkey.

The United States has received from the Greek Government an urgent appeal for financial and economic assistance. Preliminary reports from the American economic mission now in Greece and reports from the American Ambassador in Greece corroborate the statement of the Greek Government that assistance is imperative if Greece is to survive as a free nation.

I do not believe that the American people and the Congress wish to turn a deaf ear to the appeal of the Greek Government.

Greece is not a rich country. Lack of sufficient natural resources, has always forced the Greek people to work hard to make both ends meet. Since 1940, this industrious and peace-loving country has suffered invasion, 4 years of cruel enemy occupation, and bitter internal strife.

When forces of liberation entered Greece they found that the retreating Germans had destroyed virtually all the railways, roads, port facilities, communications, and merchant marine. More than a thousand villages had been burned. Eighty-five percent of the children were tubercular. Livestock, poultry, and draft animals had almost disappeared. Inflation had wiped out practically all savings.

As a result of these tragic conditions, a militant minority, exploiting human want and misery, was able to create political chaos which, until now, has made economic recovery impossible.

Greece is today without funds to finance the importation of those goods which are essential to bare subsistence. Under these circumstances the people of Greece cannot make progress in solving their problems of reconstruction. Greece is in desperate need of financial and economic assistance to enable it to resume purchases of food, clothing, fuel, and seeds. These are indispensable for the subsistence of its people and are obtainable only from abroad. Greece must have help to import the goods necessary to restore internal order and security so essential for economic and political recovery.

The Greek Government has also asked for the assistance of experienced American administrators, economists, and technicians to insure that the financial and other aid given to Greece shall be used effectively in creating a stable and self-sustaining economy and in improving its public administration.

The very existence of the Greek state is today threatened by the terrorist activities of several thousand armed men, led by Communists, who defy the government's authority at a number of points, particularly along the northern boundaries. A commission appointed by the United Nations Security Council is at present investigating disturbed conditions in northern Greece and alleged border violations along the frontier between Greece on the one hand and Albania, Bulgaria, and Yugoslavia on the other.

Meanwhile, the Greek Government is unable to cope with the situation. The Greek Army is small and poorly equipped. It needs supplies and equipment if it is to restore the authority of the Government throughout Greek territory.

Greece must have assistance if it is to become a self-supporting and self-respecting democracy.

The United States must supply this assistance. We have already extended to Greece certain types of relief and economic aid but these are inadequate.

There is no other country to which democratic Greece can turn.

No other nation is willing and able to provide the necessary support for a democratic Greek Government.

The British Government, which has been helping Greece, can give no further financial or economic aid after March 31. Great Britain finds itself under the necessity of reducing or liquidating its commitments in several parts of the world, including Greece.

We have considered how the United Nations might assist in this crisis. But the situation is an urgent one requiring immediate action, and the United Nations and its related organizations are not in a position to extend help of the kind that is required.

It is important to note that the Greek Government has asked for our aid in utilizing effectively the financial and other assistance we may give to Greece, and in improving its public administration. It is of the utmost importance that we supervise the use of any funds made available to Greece [applause], in such a manner that each dollar spent will count toward making Greece self-supporting, and will help to build an economy in which a healthy democracy can flourish.

No government is perfect. One of the chief virtues of a democracy, however, is that its defects are always visible and under democratic processes can be pointed out and corrected. The Government of Greece is not perfect. Nevertheless it represents 85 percent of the members of the Greek Parliament who were chosen in an election last year. Foreign observers, including 692 Americans, considered this election to be a fair expression of the views of the Greek people.

The Greek Government has been operating in an atmosphere of chaos and extremism. It has made mistakes. The extension of aid by this country does not mean that the United States condones everything that the Greek Government has done or will do. We have condemned in the past, and we condemn now, extremist measures of the right or the left. We have in the past advised tolerance, and we advise tolerance now.

Greece's neighbor, Turkey, also deserves our attention.

The future of Turkey as an independent and economically sound state is clearly no less important to the freedom-loving peoples of the world than the future of Greece. The circumstances in which Turkey finds itself today are considerably different from those of Greece. Turkey has been spared the disasters that have beset Greece. And during the war, the United States and Great Britain furnished Turkey with material aid.

Nevertheless, Turkey now needs our support.

Since the war, Turkey has sought financial assistance from Great Britain and the United States for the purpose of effecting that modernization necessary for the maintenance of its national integrity.

That integrity is essential to the preservation of order in the Middle East.

The British Government has informed us that, owing to its own difficulties, it can no longer extend financial or economic aid to Turkey.

As in the case of Greece, if Turkey is to have the assistance it needs, the United States must supply it. We are the only country able to provide that help.

I am fully aware of the broad implications involved if the United States extends assistance to Greece and Turkey, and I shall discuss these implications with you at this time.

One of the primary objectives of the foreign policy of the United States is the creation of conditions in which we and other nations will be able to work out a way of life free from coercion. This was a fundamental issue in the war with Germany and Japan. Our victory was won over countries which sought to impose their will, and their way of life, upon other nations.

To insure the peaceful development of nations, free from coercion, the United States has taken a leading part in establishing the United Nations. The United Nations is designed to make possible lasting freedom and independence for all its members. We shall not realize our objectives, however, unless we are willing to help free peoples to maintain their free institutions and their national integrity against aggressive movements that seek to impose upon them totalitarian regimes. [Applause.] This is no more than a frank recognition that totalitarian regimes imposed on free peoples, by direct or indirect aggression, undermine the foundations of international peace and hence the security of the United States.

The peoples of a number of countries of the world have recently had totalitarian regimes forced upon them against their will. The Government of the United States has made frequent protests against coercion and intimidation, in violation of the Yalta agreement, in Poland, Rumania, and Bulgaria. I must also state that in a number of other countries there have been similar developments.

At the present moment in world history nearly every nation must choose between alternative ways of life. The choice is too often not a free one.

One way of life is based upon the will of the majority, and is distinguished by free institutions, representative government, free elections, guaranties of individual liberty, freedom of speech and religion, and freedom from political oppression.

The second way of life is based upon the will of a minority forcibly imposed upon the majority. It relies upon terror and oppression, a controlled press and radio, fixed elections, and the suppression of personal freedoms.

I believe that it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures.

I believe that we must assist free peoples to work out their own destinies in their own way.

I believe that our help should be primarily through economic and

financial aid, which is essential to economic stability and orderly political processes.

The world is not static and the status quo is not sacred. But we cannot allow changes in the status quo in violation of the Charter of the United Nations by such methods as coercion, or by such subterfuges as political infiltration. In helping free and independent nations to maintain their freedom, the United States will be giving effect to the principles of the Charter of the United Nations.

It is necessary only to glance at a map to realize that the survival and integrity of the Greek nation are of grave importance in a much wider situation. If Greece should fall under the control of an armed minority, the effect upon its neighbor, Turkey, would be immediate and serious. Confusion and disorder might well spread throughout the entire Middle East.

Moreover, the disappearance of Greece as an independent state would have a profound effect upon those countries in Europe whose peoples are struggling against great difficulties to maintain their freedoms and their independence while they repair the damages of war.

It would be an unspeakable tragedy if these countries, which have struggled so long against overwhelming odds, should lose that victory for which they sacrificed so much. Collapse of free institutions and loss of independence would be disastrous not only for them but for the world. Discouragement and possibly failure would quickly be the lot of neighboring peoples striving to maintain their freedom and independence.

Should we fail to aid Greece and Turkey in this fateful hour, the effect will be far reaching to the West as well as to the East.

We must take immediate and resolute action.

I therefore ask the Congress to provide authority for assistance to Greece and Turkey in the amount of \$400,000,000 for the period ending June 30, 1948. In requesting these funds, I have taken into consideration the maximum amount of relief assistance which would be furnished to Greece out of the \$350,000,000 which I recently requested that the Congress authorize for the prevention of starvation and suffering in countries devastated by the war.

In addition to funds, I ask the Congress to authorize the detail of American civilian and military personnel to Greece and Turkey, at the request of those countries, to assist in the tasks of reconstruction, and for the purpose of supervising the use of such financial and material assistance as may be furnished. I recommend that authority also be provided for the instruction and training of selected Greek and Turkish personnel.

Finally, I ask that the Congress provide authority which will permit the speediest and most effective use, in terms of needed commodities, supplies, and equipment, of such funds as may be authorized.

If further funds, or further authority, should be needed for purposes indicated in this message, I shall not hesitate to bring the situation before

the Congress. On this subject the executive and legislative branches of the Government must work together.

This is a serious course upon which we embark.

I would not recommend it except that the alternative is much more serious. [Applause.]

The United States contributed \$341,000,000,000 toward winning World War II. This is an investment in world freedom and world peace.

The assistance that I am recommending for Greece and Turkey amounts to little more than one-tenth of 1 percent of this investment. It is only common sense that we should safeguard this investment and make sure that it was not in vain.

The seeds of totalitarian regimes are nurtured by misery and want. They spread and grow in the evil soil of poverty and strife. They reach their full growth when the hope of a people for a better life has died.

We must keep that hope alive.

The free peoples of the world look to us for support in maintaining their freedoms.

If we falter in our leadership, we may endanger the peace of the world—and we shall surely endanger the welfare of our own Nation.

Great responsibilities have been placed upon us by the swift movement of events.

I am confident that the Congress will face these responsibilities squarely. [Applause, the members rising.]



XIX

War and National Defense



109. AUTHORITY OF MILITARY COMMISSION

In re Yamashita

110. TOTAL MILITARY RULE REJECTED

Duncan v. Kahanamoku, Sheriff

111. DEFENSE AGAINST ATOM

The United States News

W

ITH the necessary growth of agencies for national defense, it becomes increasingly important that the individual citizen recognize not only his responsibility for participation in the defense program (see *Girouard v. United States*, no. 40, *supra*), but that he be constantly aware of the relationship of the civil government to the military power and agencies. The authority of a military commission, and the supremacy of civil authority are considered in this chapter.

WAR AND NATIONAL DEFENSE



109. AUTHORITY OF MILITARY COMMISSION

The American Revolution, the Mexican War, the Civil War, the Spanish-American War, World War I, and World War II have all made indelible marks on American government. Without them America and the government of the United States would not be what they are today. Is there any danger that in the aftermath of World War II the American government is failing to observe some of the principles which were upheld by the American Revolution?

In the case of *Estep v. United States*, 327 U. S. 114 (1946), is found an illustration of protection of individual rights by judicial review, involving the selective service program. A serious question has arisen as to the protection of individual rights of persons who waged war against the United States, as is indicated in the opinion of the court and the dissenting opinions *In Re Yamashita*, 327 U. S. 1 (1946), from which the following excerpts were taken. In *Chambers v. Florida* (no. 45, *supra*), the Supreme Court of the United States decided that the courts of the State of Florida had improperly convicted men on insufficient evidence. Would it be proper for the Supreme Court of the United States to consider whether or not the evidence on which a military commission convicted a man was sufficient? In the case of *Schechter v. United States* (no. 69, *supra*), the Supreme Court decided that Congress had unconstitutionally delegated legislative authority to the executive for making codes of fair competition. Is it possible that the delegation to the executive branch (army) of authority to make codes of fair competition in warfare is an unconstitutional delegation of legislative authority?

IN RE YAMASHITA

MR. CHIEF JUSTICE STONE delivered the opinion of the Court.

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From the petitions and supporting papers it appears that prior to September 3, 1945, petitioner was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that date he surrendered to and became a prisoner of war of the United States Army Forces in Baguio, Philippine Islands. On September 25th, by order of respondent, Lieutenant General Wilhelm D. Styer, Commanding General of the United States Army Forces, Western Pacific,

which command embraces the Philippine Islands, petitioner was served with a charge prepared by the Judge Advocate General's Department of the Army, purporting to charge petitioner with a violation of the law of war. On October 8, 1945, petitioner, after pleading not guilty to the charge, was held for trial before a military commission of five Army officers appointed by order of General Styer. The order appointed six Army officers, all lawyers, as defense counsel. Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged.

On the same date a bill of particulars was filed by the prosecution, and the commission heard a motion made in petitioner's behalf to dismiss the charge on the ground that it failed to state a violation of the law of war. On October 29th the commission was reconvened, a supplemental bill of particulars was filed, and the motion to dismiss was denied. The trial then proceeded until its conclusion on December 7, 1945, the commission hearing two hundred and eighty-six witnesses, who gave over three thousand pages of testimony. On that date petitioner was found guilty of the offense as charged and sentenced to death by hanging.

The petitions for habeas corpus set up that the detention of petitioner for the purpose of the trial was unlawful for reasons which are now urged as showing that the military commission was without lawful authority or jurisdiction to place petitioner on trial, as follows:

(a) That the military commission which tried and convicted petitioner was not lawfully created, and that no military commission to try petitioner for violations of the law of war could lawfully be convened after the cessation of hostilities between the armed forces of the United States and Japan;

(c) That the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War (10 U. S. C. §§ 1496, 1509) and the Geneva Convention (47 Stat. 2021), and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment;

In *Ex parte Quirin*, 317 U. S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offences against the Law of Nations . . .," of which the law of war is a part, had by the Articles of War (10 U. S. C. §§ 1471-1593) recognized

the "military commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war. Article 15 declares that the "provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." See a similar provision of the Espionage Act of 1917, 50 U. S. C. § 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions "any other person who by the law of war is subject to trial by military tribunals," and who, under Article 12, may be tried by court-martial, or under Article 15 by military commission.

We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.

We also emphasized in *Ex parte Quirin*, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. . . . They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." 28 U. S. C. §§ 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. . . .

Finally, we held in *Ex parte Quirin, supra*, 24, 25, as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. Cf. *Ex parte Kawato*, 317 U. S. 69. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.

With these governing principles in mind we turn to the consideration of the several contentions urged to establish want of authority in the commission. We are not here concerned with the power of military commissions to try civilians. . . . The Government's contention is that General Styer's order creating the commission conferred authority on it only to try the purported charge of violation of the law of war committed by petitioner, an enemy belligerent, while in command of a hostile army occupying United States territory during time of war. Our first inquiry must therefore be whether the present commission was created by lawful military command and, if so, whether authority could thus be conferred on the commission to place petitioner on trial after the cessation of hostilities between the armed forces of the United States and Japan.

The authority to create the commission. General Styer's order for the appointment of the commission was made by him as Commander of the United States Army Forces, Western Pacific. His command includes, as part of a vastly greater area, the Philippine Islands, where the alleged offenses were committed, where petitioner surrendered as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army. The congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long-established American precedents. Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court-martial, as was General Styer, who had been vested with that power by order of the President. 2 Winthrop, *Military Law and Precedents*, 2d ed., *1302; cf. Article of War 8.

Here the commission was not only created by a commander competent to appoint it, but his order conformed to the established policy of the Government and to higher military commands authorizing his action. In a proclamation of July 2, 1942 (56 Stat. 1964), the President proclaimed that enemy belligerents who, during time of war, enter the United States, or any territory or possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals. Paragraph 10 of the Declaration of Potsdam of July 26, 1945, declared that ". . . stern justice shall be meted out to all war criminals,

including those who have visited cruelties upon our prisoners." U. S. Dept. of State Bull., Vol. XIII, No. 318, pp. 137-138. This Declaration was accepted by the Japanese government by its note of August 10, 1945. U. S. Dept. of State Bull., Vol. XIII, No. 320, p. 205.

By direction of the President, the Joint Chiefs of Staff of the American Military Forces, on September 12, 1945, instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial, before appropriate military tribunals, of such Japanese war criminals "as have been or may be apprehended." By order of General MacArthur of September 24, 1945, General Styer was specifically directed to proceed with the trial of petitioner upon the charge here involved. This order was accompanied by detailed rules and regulations which General MacArthur prescribed for the trial of war criminals. These regulations directed, among other things, that review of the sentence imposed by the commission should be by the officer convening it, with "authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed," and directed that no sentence of death should be carried into effect until confirmed by the Commander in Chief, United States Army Forces, Pacific.

It thus appears that the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants. And we turn to the question whether the authority to create the commission and direct the trial by military order continued after the cessation of hostilities.

An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. *Ex parte Quirin, supra*, 28. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed. . . . The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. . . .

We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In

fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.

The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war. The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government.

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We cannot say that the commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty or military command defining the commission's authority. For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of a military tribunal in admitting evidence, which Congress or controlling military command has directed to be excluded, may be drawn in question by petition for habeas corpus or prohibition.

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. . . We therefore conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful, and that the petition for certiorari, and leave to file in this Court petitions for writs of habeas corpus and prohibition should be, and they are

Denied.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

MR. JUSTICE MURPHY, dissenting.

The significance of the issue facing the Court today cannot be over-emphasized. An American military commission has been established to try a fallen military commander of a conquered nation for an alleged war crime. The authority for such action grows out of the exercise of the power conferred upon Congress by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offences against the Law of Nations . . ." The grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances.

The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. The petitioner was the commander of an army totally destroyed by the superior power of this nation. While under heavy and destructive attack by our forces, his troops committed many brutal atrocities and other high crimes. Hostilities ceased and he voluntarily surrendered. At that point he was entitled, as an individual protected by the due process clause of the Fifth Amendment, to be treated fairly and justly according to the accepted rules of law and procedure. He was also entitled to a fair trial

as to any alleged crimes and to be free from charges of legally unrecognized crimes that would serve only to permit his accusers to satisfy their desires for revenge.

A military commission was appointed to try the petitioner for an alleged war crime. The trial was ordered to be held in territory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterflow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely, for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.

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MR. JUSTICE RUTLEDGE, dissenting.

Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convic-

tions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes' never rose.

With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.

This trial is unprecedented in our history. Never before have we tried and convicted an enemy general for action taken during hostilities or otherwise in the course of military operations or duty. Much less have we condemned one for failing to take action. The novelty is not lessened by the trial's having taken place after hostilities ended and the enemy, including the accused, had surrendered. Moreover, so far as the time permitted for our consideration has given opportunity, I have not been able to find precedent for the proceeding in the system of any nation founded in the basic principles of our constitutional democracy, in the laws of war or in other internationally binding authority or usage.

The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward

with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.

110. TOTAL MILITARY RULE REJECTED

What is *martial law*? Can military courts punish civilians? Helpful in answering these questions is the following reading taken from the opinion of the court in the case of *Duncan v. Kahanamoku, Sheriff*, 327 U. S. 304 (1946). Mr. Justice Jackson took no part in this decision of the Supreme Court of the United States. Mr. Justice Murphy wrote a concurring opinion. Mr. Justice Burton, with whom Mr. Justice Frankfurter concurred, wrote a dissenting opinion.

DUNCAN v. KAHANAMOKU

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioners in these cases were sentenced to prison by military tribunals in Hawaii. Both are civilians. The question before us is whether the military tribunals had power to do this. The United States district court for Hawaii in habeas corpus proceedings held that the military tribunals had no such power and ordered that they be set free. The circuit court of appeals reversed, and ordered that the petitioners be returned to prison. 146 F. 2d 576. Both cases thus involve the rights of individuals charged with crime and not connected with the armed forces to have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards. Since these judicial safeguards are prized privileges of our system of government we granted certiorari.

The following events led to the military tribunals' exercise of jurisdiction over the petitioners. On December 7, 1941, immediately following the surprise air attack by the Japanese on Pearl Harbor, the Governor of Hawaii by proclamation undertook to suspend the privilege of the writ of habeas corpus and to place the Territory under "martial law." Section 67 of the Hawaiian Organic Act, 31 Stat. 141, 153, authorizes the Territorial Governor to take this action "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it . . ." His action was to remain in effect only "until communication can be had with the President and his decision thereon made known." The President approved the Governor's action on December 9th. The Governor's proclamation also authorized and requested the Commanding General, "during the . . . emergency and until danger of invasion is removed, to exercise all

the powers normally exercised" by the Governor and by the "judicial officers and employees of this territory."

Pursuant to this authorization the commanding general immediately proclaimed himself Military Governor and undertook the defense of the Territory and the maintenance of order. On December 8th, both civil and criminal courts were forbidden to summon jurors and witnesses and to try cases. The Commanding General established military tribunals to take the place of the courts. These were to try civilians charged with violating the laws of the United States and of the Territory, and rules, regulations, orders or policies of the Military Government. Rules of evidence and procedure of courts of law were not to control the military trials. In imposing penalties the military tribunals were to be "guided by, but not limited to the penalties authorized by the courts martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases." The rule announced was simply that punishment was to be "commensurate with the offense committed" and that the death penalty might be imposed "in appropriate cases." Thus the military authorities took over the government of Hawaii. They could and did, by simply promulgating orders, govern the day to day activities of civilians who lived, worked, or were merely passing through there. The military tribunals interpreted the very orders promulgated by the military authorities and proceeded to punish violators. The sentences imposed were not subject to direct appellate court review, since it had long been established that military tribunals are not part of our judicial system. *Ex parte Vallandigham*, 1 Wall. 243. The military undoubtedly assumed that its rule was not subject to any judicial control whatever, for by orders issued on August 25, 1943, it prohibited even accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney. Military tribunals could punish violators of these orders by fine, imprisonment or death.

White, the petitioner in No. 15, was a stockbroker in Honolulu. Neither he nor his business was connected with the armed forces. On August 20, 1942, more than eight months after the Pearl Harbor attack, the military police arrested him. The charge against him was embezzling stock belonging to another civilian in violation of Chapter 183 of the Revised Laws of Hawaii. Though by the time of White's arrest the courts were permitted "as agents of the Military Governor" to dispose of some non-jury civil cases, they were still forbidden to summon jurors and to exercise criminal jurisdiction. On August 22nd, White was brought before a military tribunal designated as a "Provost Court." The "Court" orally informed him of the charge. He objected to the tribunal's jurisdiction but the objection was overruled. He demanded to be tried by a jury. This request was denied. His attorney asked for additional time to prepare the case. This was refused. On August 25th he was tried and convicted. The tribunal sentenced him to five years imprisonment. Later the sentence was reduced to four years.

Duncan, the petitioner in No. 14, was a civilian shipfitter employed in the Navy Yard at Honolulu. On February 24, 1944, more than two years and two months after the Pearl Harbor attack, he engaged in a brawl with two armed Marine sentries at the yard. He was arrested by the military authorities. By the time of his arrest the military had to some extent eased the stringency of military rule. Schools, bars and motion picture theatres had been reopened. Courts had been authorized to "exercise their normal jurisdiction." They were once more summoning jurors and witnesses and conducting criminal trials. There were important exceptions, however. One of these was that only military tribunals were to try "Criminal prosecutions for violations of military orders." As the record shows, these military orders still covered a wide range of day to day civilian conduct. Duncan was charged with violating one of these orders, paragraph 8.01, Title 8, of General Order No. 2, which prohibited assault on military or naval personnel with intent to resist or hinder them in the discharge of their duty. He was, therefore, tried by a military tribunal rather than the territorial court, although the general laws of Hawaii made assault a crime. Revised L. H. 1935, ch. 166. A conviction followed and Duncan was sentenced to six months imprisonment.

Both White and Duncan challenged the power of the military tribunals to try them by petitions for writs of habeas corpus filed in the district court for Hawaii on March 14 and April 14, 1944, respectively. Their petitions urged both statutory and constitutional grounds. The court issued orders to show cause. Returns to these orders contended that Hawaii had become part of an active theatre of war constantly threatened by invasion from without; that the writ of habeas corpus had therefore properly been suspended and martial law had validly been established in accordance with the provisions of the Organic Act; that consequently the district court did not have jurisdiction to issue the writ; and that the trials of petitioners by military tribunals pursuant to orders by the Military Governor issued because of military necessity were valid. Each petitioner filed a traverse to the returns, which traverse challenged among other things the suspension of habeas corpus, the establishment of martial law and the validity of the Military Governor's orders, asserting that such action could not be taken except when required by military necessity due to actual or threatened invasion, which even if it did exist on December 7, 1941, did not exist when the petitioners were tried; and that, whatever the necessity for martial law, there was no justification for trying them in military tribunals rather than the regular courts of law. The district court, after separate trials, found in each case, among other things, that the courts had always been able to function but for the military orders closing them, and that consequently there was no military necessity for the trial of petitioners by military tribunals rather than regular courts. It accordingly held the trials void and ordered the release of the petitioners.

The circuit court of appeals, assuming without deciding that the dis-

strict court had jurisdiction to entertain the petitions, held the military trials valid and reversed the ruling of the district court. . . .

Since both the language of the Organic Act and its legislative history fail to indicate that the scope of "martial law" in Hawaii includes the supplanting of courts by military tribunals, we must look to other sources in order to interpret that term. We think the answer may be found in the birth, development and growth of our governmental institutions up to the time Congress passed the Organic Act. Have the principles and practices developed during the birth and growth of our political institutions been such as to persuade us that Congress intended that loyal civilians in loyal territory should have their daily conduct governed by military orders substituted for criminal laws, and that such civilians should be tried and punished by military tribunals? Let us examine what those principles and practices have been, with respect to the position of civilian government and the courts and compare that with the standing of military tribunals throughout our history.

People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule which, according to the Government, Congress has authorized here. In this country that fear has become part of our cultural and political institutions. The story of that development is well known and we see no need to retell it all. But we might mention a few pertinent incidents. As early as the 17th Century our British ancestors took political action against aggressive military rule. When James I and Charles I authorized martial law for purposes of speedily punishing all types of crimes committed by civilians the protest led to the historic Petition of Right which in uncompromising terms objected to this arbitrary procedure and prayed that it be stopped and never repeated. When later the American colonies declared their independence one of the grievances listed by Jefferson was that the King had endeavored to render the military superior to the civil power. The executive and military officials who later found it necessary to utilize the armed forces to keep order in a young and turbulent nation, did not lose sight of the philosophy embodied in the Petition of Right and the Declaration of Independence, that existing civilian government and especially the courts were not to be interfered with by the exercise of military power. In 1787, the year in which the Constitution was formulated, the Governor of Massachusetts Colony used the militia to cope with Shay's Rebellion. In his instructions to the Commander of the troops the Governor listed the "great objects" of the mission. The troops were to "protect the judicial courts . . .," "to assist the civil magistrates in executing the laws . . .," and to "aid them in apprehending the disturbers of the public peace . . ." The Commander was to consider himself "constantly as under the direction of the civil officer, saving where any armed force shall appear and oppose . . . [his] march-

ing to execute these orders." President Washington's instructions to the Commander of the troops sent into Pennsylvania to suppress the Whiskey Rebellion of 1794 were to the same effect. The troops were to see to it that the laws were enforced and were to deliver the leaders of armed insurgents to the regular courts for trial. The President admonished the Commanding General "that the judge can not be controlled in his functions . . ." In the many instances of the use of troops to control the activities of civilians that followed, the troops were generally again employed merely to aid and not to supplant the civilian authorities. The last noteworthy incident before the enactment of the Organic Act was the rioting that occurred in the spring of 1899 at the Coeur d'Alene mines of Shoshone County, Idaho. The President ordered the regular troops to report to the Governor for instructions and to support the civil authorities in preserving the peace. Later the State Auditor as agent of the Governor, and not the Commanding General, ordered the troops to detain citizens without trial and to aid the Auditor in doing all he thought necessary to stop the riot. Once more, the military authorities did not undertake to supplant the courts and to establish military tribunals to try and punish ordinary civilian offenders.

Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. *Ex parte Quirin*, 317 U. S. 1, 19. Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See *Ex parte Milligan*, 4 Wall. 2; *Chambers v. Florida*, 309 U. S. 227. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.

Military tribunals have no such standing. For as this Court has said before: ". . . the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Dow v. Johnson*, 100 U. S. 158, 169. Congress prior to the time of the enactment of the Organic Act had only once authorized the supplanting of the courts by military tribunals. Legislation to that effect was enacted immediately after the South's unsuccessful attempt to secede from the Union. Insofar as that legislation applied to the Southern States

after the war was at an end it was challenged by a series of Presidential vetoes as vigorous as any in the country's history. And in order to prevent this Court from passing on the constitutionality of this legislation Congress found it necessary to curtail our appellate jurisdiction. Indeed, prior to the Organic Act, the only time this Court has ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Ex parte Milligan*, 4 Wall. 2, 124-125.

We believe that when Congress passed the Hawaiian Organic Act and authorized the establishment of "martial law" it had in mind and did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions prior to the time Congress passed the Organic Act. The phrase "martial law" as employed in that Act, therefore, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals. Yet the Government seeks to justify the punishment of both White and Duncan on the ground of such supposed congressional authorization. We hold that both petitioners are now entitled to be released from custody.

Reversed.

111. DEFENSE AGAINST ATOM

The problem of national defense was radically changed by the introduction of atomic power. The approach of the United States toward control of atomic power is indicated in the following reading.¹

NEW PLAN FOR THE ATOM: DEFENSE AS BEST CONTROL

Atomic-energy plans, past, present and future, are bubbling up again.

Atomic development, according to Senator McMahon, former head of the Senate Atomic Energy Committee, is being pushed by Russian scientists working in new fission plants back of the Ural Mountains. At least a dozen other nations are pouring money into atomic research.

Atom control, if Senator McMahon has his way, will be turned over to the World Court, not to the Security Council of the United Nations. U. S. Delegate Warren R. Austin now wants the atomic bomb to be considered as part of a general disarmament plan. The real new plan, however, is turning out to be a rapidly improving defense against the atom.

¹ Reprinted from the February 7, 1947, issue of *The United States News*, an independent weekly magazine on national affairs published at Washington. Copyright 1947 United States News Publishing Corporation.

Atomic secrets, according to David Lilienthal, new chairman of the Atomic Energy Commission, really were turned over to Russia by the U. S. Army in the Smyth report, published in 1945.

Why the atomic bomb was used in the first place is now explained, too, by Henry L. Stimson, former Secretary of War, who approved the decision for its use. Dr. Karl T. Compton, one of the bomb developers, also tells what led to its use against Japan and why no warning was given.

Atomic facts and developments are crowding back into the picture after a period of quiet:

Russia is known to be experimenting with elements other than uranium. Nuclear research has been given top priority in the Soviet Union. Scientific secrets of the atom bomb have been uncovered by the Russians. But Russia has not yet developed an atomic bomb; that development is at least three to five years away. And one bomb in Russia's hands will not be the basis for an attack.

Lack of industrial know-how, not of scientific knowledge, is retarding Russian development of the atom. The method of putting the bomb together remains an American monopoly.

Bomb manufacture is revealed as a highly intricate and slow process. The present U. S. stockpile of atomic bombs, after nearly five years of effort, apparently is not more than 30 or 40, if that. Only two bombs were in U. S. possession for the attacks on Hiroshima and Nagasaki.

Cost of atomic development is high. Atomic energy is down for \$440,000,000 in the President's budget for next year. Most of this money will go toward developing military uses of atomic energy, according to a report from the Atomic Energy Commission. Other nations are spending even more from their current budgets than the U. S. on atomic research this year. Small nations, such as Switzerland, are allotting millions for development.

The U. S. now is certain to keep its engineering secrets about the bomb until effective international control is set up. It will keep its leadership as long as the public is willing to spend money freely and as long as it maintains its present edge industrially. The time when Russia can catch up on that basis is not foreseeable.

New facts about protection from the atom are coming to light, too:

Means of defense against the bomb are being developed. They are based on new methods of stopping the bomb before it reaches U. S. targets.

Latest indications are that guided-missile and rocket defense against aircraft is reaching a stage where large bombers carrying the atomic weapon probably could not reach a defended city. Defense against V-1 weapons carrying the bomb, too, is almost perfected, through proximity-fuse missiles. In theory, anything that can be tracked by radar can be shot down before it reaches its target.

Biggest gap in the new defense plan is in protection against V-2

weapons. These missiles, equipped with atomic warheads, could not be tracked by radar, could not be stopped by any means now known.

Both the Army and Navy have set up atomic-defense boards. Each is counting on scientific developments, rather than international control, to protect this country from an atomic attack in the future. While neither has said so publicly, both fear that an international ban on atomic weapons would be almost impossible to enforce. Only punishment possible for a violator nation would be war, probably an atomic war. Thus, real protection from the bomb must be a military defense.

A new picture, meanwhile, is being pieced together concerning U. S. use of the bomb against Japan. Former War Secretary Stimson, in a Harper's article, and Dr. Compton, writing in *The Atlantic Monthly*, add these facts to the story:

The decision to use the bomb against Hiroshima was made by a nine-man board of Government officials and top atomic experts. This board was headed by Mr. Stimson and included State and Navy Department representatives and James F. Byrnes, then Special Assistant to the President. The decision was approved by President Truman just prior to the bombing.

No warning of the nature of the bomb or demonstration of its effect was considered advisable by the board, as only two bombs were available and it was not known whether they would explode when dropped from an airplane. Theory was that the psychological effect would have been ruined if the bombs had failed to explode after the Japanese had been warned about what was happening.

New evidence indicates that the Hiroshima and Nagasaki explosions put an immediate end to a war that otherwise would have continued, in one form or another, for a year longer, according to Mr. Stimson. Fear of more such bombings caused Japan's leaders to quit, thus saving up to a million casualties, he insists.

Limitations of the bomb, as well as its past successes, are coming out in new findings. Its major drawbacks now appear to be these:

Results of the Bikini tests show that one or two ships would be the maximum number put out of action by a single atomic attack against a normally dispersed formation of a fleet. Greater use of submarines in future sea warfare is to make naval targets even harder to hit. Cost of the bomb in sea warfare, thus, is expected to be prohibitive, when compared with the cost of other effective new weapons, such as naval rockets, guided missiles and torpedoes.

Military planners, too, are finding that radioactive properties of the bomb make it impracticable against troops in land warfare. An attacking force cannot attack through it. A defending force would suffer casualties itself from bombing an attacking enemy. And the number of bombs needed to seal off a large combat force is more than the expected supply.

Against cities, where the bomb appears to be most effective, it is found to have been more costly and less efficient than mass fire raids.

Surveys in Japan show that one atomic attack on Hiroshima caused 30 per cent fewer deaths and 65 per cent less damage than one fire raid on Tokyo.

New control plans, nonetheless, are being pressed by U. N. delegates and new ideas introduced in an effort to set up some form of international regulation quickly.

Unlike previous proposals, the new plans are compromise measures designed to avoid a change in the U. N. Charter and to get around the veto question. None quite succeeds. Senator McMahon's plan puts the agreement to ban atom bombs into a treaty, leaves the question of when the treaty is violated up to the World Court. But punishment still stems from the Security Council, still might be vetoed by a member nation. Another plan provides for an international inspection authority to determine violations, then authorizes U. N. member nations to declare war on the offender separately. But this puts punishment outside of U. N. joint action.

A new Russian plan, meanwhile, complicates matters further. Soviet delegates now say that atomic control should be considered along with a ban on other "weapons of mass destruction." They ask three months to draft such a disarmament plan. After this delay, discussion of international control would be resumed. This, presumably, would include such things as bacteriological warfare, mass fire raids, bombing attacks on cities, and V-2 weapons, and, thus, could go on for years, at the present rate.

U. S. policy on international atom control now is this: Basis of any acceptable plan must include: creation of a world authority to prevent manufacture and use of the bomb; an inspection system that works, and punishment for offending nations. The inescapable fact is that inspectors must be able to pry into every factory, cave and building in the world, while punishment for offenders must be nothing short of war. Russia opposes such forms of inspection and punishment.

Prospects, then, are for the latest rash of atomic plans and developments to meet with Russian delay tactics, for discussion and counterplaning to drag out for several years. Effective control of the bomb on an international basis is not yet in sight, 16 months after Hiroshima. Such control is not to come until the Russians find that the cost and limitations of a stockpile of atomic bombs outweigh any possible advantages of an atomic-armaments race. Until then, the real control plan is to be in new measures for military defense against the atom.

XX

Territories and Dependencies



112. EARLY TERRITORIAL GOVERNMENT

Northwest Ordinance

113. UNINCORPORATED TERRITORY

Dorr v. United States

“T

HE Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . .” Not only is this Constitutional provision of interest in connection with the following chapter, but students will want to remember also the provision that “New States may be admitted by Congress into this Union; . . .”

TERRITORIES AND DEPENDENCIES



112. EARLY TERRITORIAL GOVERNMENT

Significant in the history of government of the United States were the provisions made by the Congress of the Confederation in 1787 for the government of the Northwest Territory. Among important liberal provisions students will note the intention of admitting new states "on an equal footing with the original States." See *Coyle v. Smith*, reading no. 30, *supra*. The text of this ordinance is taken from Thorpe, *Federal and State Constitutions*, Vol. II.

THE NORTHWEST TERRITORIAL GOVERNMENT—1787

[The Congress of the Confederation, July 13, 1787]

An Ordinance for the government of the territory of the United States
northwest of the river Ohio

Be it ordained by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be (being of full age) and attested by three

witnesses;—and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid, That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other

civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly; *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the

residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the president of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.

ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be

bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona-fide* purchasers. No tax shall be imposed on land the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying

places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord one thousand seven hundred and eighty-seven, and of their sovereignty and independence the twelfth.

113. UNINCORPORATED TERRITORY

It is worth while to note the distinctions between *incorporated* and *unincorporated* territory and between a *fundamental* right and one which is not, in the opinion of the Supreme Court in the following excerpt from *Dorr v. United States*, 195 U. S. 138 (1904). Consideration should also be given to the dissenting opinion of Mr. Justice Harlan. Is it possible that there was in the United States following the Spanish-American War an imperialistic nationalism which influenced the majority of the Supreme Court?

DORR v. UNITED STATES

MR. JUSTICE DAY delivered the opinion of the court.

This case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands.

The recent consideration by this court and the full discussion had in the opinions delivered in the so-called "*Insular cases*," renders superfluous any attempt to reconsider the constitutional relation of the powers of the government to territory acquired by a treaty cession to the United States. *De Lima v. Bidwell*, 182 U. S. 1; *Downes v. Bidwell*, 182 U. S. 244. The opinions rendered in those cases cover every phase of the question, either legal or historical, and it would be useless to undertake to add to the elaborate consideration of the subject had therein. In the still more recent case of *Hawaii v. Mankichi*, 190 U. S. 197, the right to a jury trial in outlying territory of the United States was under consideration. For the present purpose it is only necessary to state certain conclusions which are deemed to be established by prior adjudications, and are decisive of this case.

It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government. "The Government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument." *Downes v. Bidwell*, 182 U. S. 244, 288, and cases cited. It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations. This principle has been recognized by this court from its earliest decisions. The convention which framed the Constitution of the United States, in view of the territory already possessed and the

possibility of acquiring more, inserted in that instrument, in article IV, section 3, a grant of express power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

As early as the February term, 1810, of this court, in the case of *Seré and Lralde v. Pitot and others*, 6 Cranch, 332, Chief Justice Marshall, delivering the opinion of the court, said:

"The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has given them a legislative, an executive and a judiciary, with such powers as it has been their will to assign to those departments respectively."

And later, the same eminent judge, delivering the opinion of the court in the leading case upon the subject, *American Insurance Co. v. Canter*, 1 Pet. 511, 542, says:

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty. The usage of the word is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

"On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'The inhabitants of the territories, which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States.'

"This treaty is the law of the land, and admits the inhabitants of

Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

While these cases, and others which are cited in the late case of *Downes v. Bidwell*, *supra*, sustain the right of Congress to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in union, the exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Scott v. Sandford*, 19 How. 393, 614, said:

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?"

"To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, *supra*.

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

For this case, the practical question is, must Congress, in establishing a system for trial of crimes and offenses committed in the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United

States without Congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (Article IX) "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government, 32 Stat. 691, there is express provision that section eighteen hundred and ninety-one of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere within the United States.

The requirements of the Constitution as to a jury are found in article III, section 2:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the States where such crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

And in article six of the amendments to the Constitution:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

It was said in the *Mankichi* case, *supra*, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. . . .

In the same case Mr. Justice Brown, in the course of his opinion, said:

"We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by jury and presentment by grand jury] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well being."

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If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to Statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

Judgment affirmed.

MR. JUSTICE PECKHAM, concurring.

I concur in the result of the opinion of the court in this case, which upholds the conviction of the plaintiffs in error on a trial at Manila, Philippine Islands, for a criminal offense, without a jury. I do so simply because of the decision in *Hawaii v. Mankichi*, 190 U. S. 197. That case was decided by the concurring views of a majority of this court, and although I did not and do not concur in those views, yet the case in my opinion is authority for the result arrived at in the case now before us, to wit, that a jury trial is not a constitutional necessity in a criminal case in Hawaii or in the Philippine Islands. . . .

I am authorized to say that the CHIEF JUSTICE [FULLER] and MR. JUSTICE BREWER agree in this concurring opinion.

MR. JUSTICE HARLAN, dissenting:

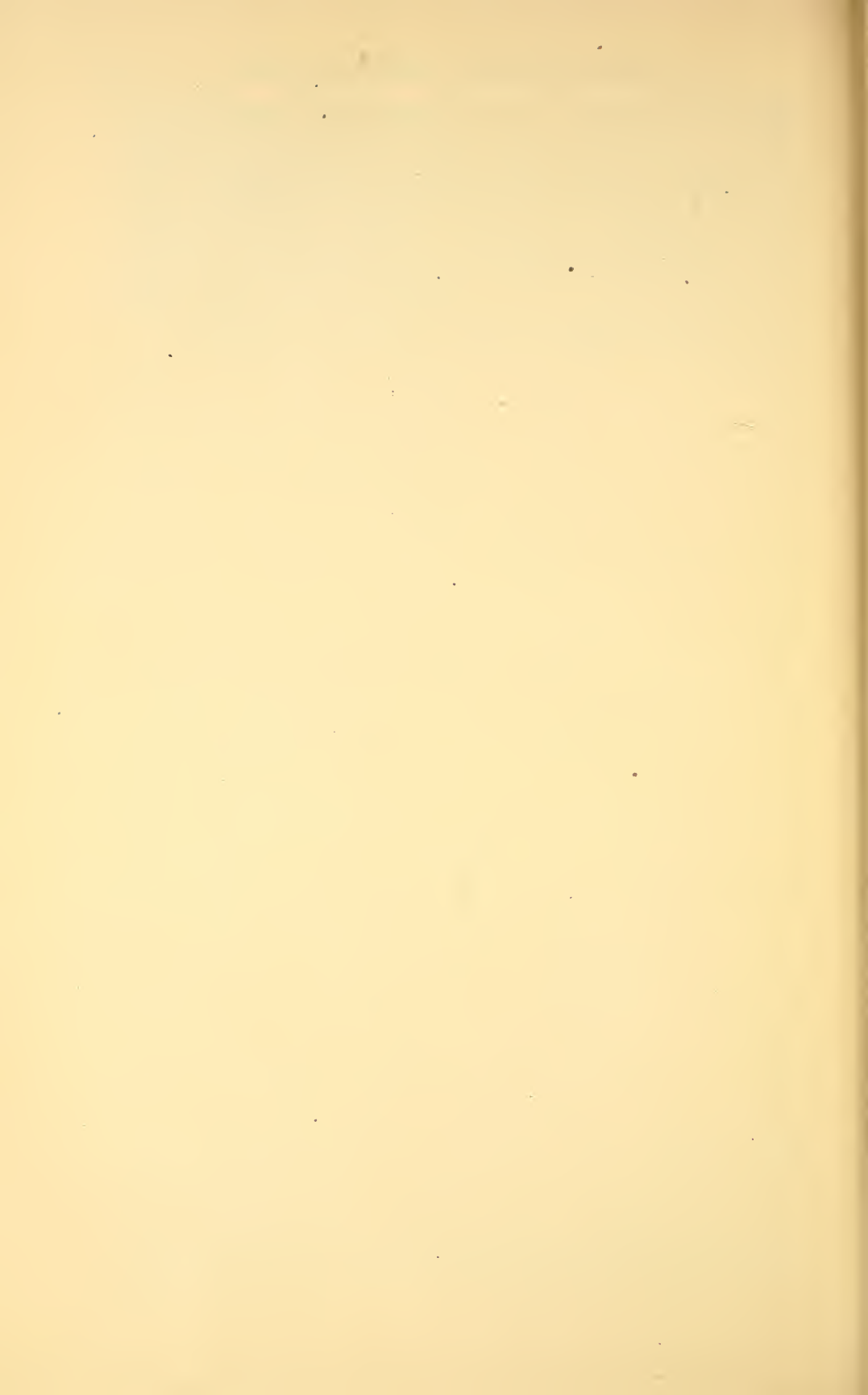
I do not believe now any more than I did when *Hawaii v. Mankichi*, .

190 U. S. 197, was decided, that the provisions of the Federal Constitution as to grand and petit juries relate to mere methods of procedure and are not fundamental in their nature. In my opinion, guaranties for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution.

The Constitution declares that *no* person, except in the land or naval forces, shall be held to answer for a capital or otherwise infamous crime, except on the presentment or indictment of a grand jury; and forbids the conviction, in a criminal prosecution, of any person, for any crime, except on the unanimous verdict of a petit jury composed of twelve persons. Necessarily, that mandate was addressed to every one committing crime punishable by the United States. This court, however, holds that these provisions are not fundamental and may be disregarded in any territory acquired in the manner the Philippine Islands were acquired, although, as heretofore decided by this court, they could not be disregarded in what are commonly called the organized territories of the United States. *Thompson v. Utah*, 170 U. S. 343. I cannot assent to this interpretation of the Constitution. It is, I submit, so obviously inconsistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction, when a different mode of amendment is expressly provided for. Grand juries and petit juries may be, at times, somewhat inconvenient in the administration of criminal justice in the Philippines. But such inconveniences are of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution. The Constitution declares that it "shall be the supreme law of the land." But the court in effect adjudges that the Philippine Islands are not part of the "land," within the meaning of the Constitution, although they are governed by the sovereign authority of the United States, and although their inhabitants are subject in all respects to its jurisdiction—as much so as are the people in the District of Columbia or in the several States of the Union. No power exists in the judiciary to suspend the operation of the Constitution in any territory governed, as to its affairs and people, by authority of the United States. As a Filipino committing the crime of murder in the Philippine Islands may be hung by the sovereign authority of the United States, and as the Philippine Islands are under a civil, not military, government, the suggestion that he may not, of right, appeal for his protection to the jury provisions of the Constitution, which constitutes the only source of the power that the Government may exercise at any time or at any place, is utterly revolting to my mind, and can never receive my sanction. The Constitution, without excepting from its provisions any persons over whom the United States may exercise jurisdiction, declares expressly that "the trial of all crimes, except in cases of impeach-

ment, shall be by jury." It is now adjudged that, that provision is not fundamental in respect of a part of the people over whom the United States may exercise full legislative, judicial and executive power. Indeed, it is adjudged, in effect, that the above clause, in its application to this case, is to be construed as if it read: "The trial of all crimes, except in cases of impeachment, *and except where Filipinos are concerned*, shall be by jury." Such a mode of constitutional interpretation plays havoc with the old-fashioned ideas of the fathers, who took care to say that the Constitution was the supreme law—supreme everywhere, at all times, and over all persons who are subject to the authority of the United States. . . .

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